Supreme Court, U.S.
FILED

No. 00- 001107 JAN 2 2001

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IN THE

Supreme Court of the United States

ROBERT E. GOLDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN P. ELWOOD
BAKER BOTTS, L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7700

NATHAN LEWIN
Counsel of Record
2555 M Street, N.W.
Washington, D.C. 20037
(202) 833-5118

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123 pp

QUESTIONS PRESENTED

1. Whether a federal district judge who has repeatedly chastised trial counsel before him because of alleged violations of courtroom protocol and has been criticized on the record by counsel for bias is disqualified from presiding over criminal contempt proceedings initiated by the judge under Fed. R. Crim. Proc. Rule 42(b) for specifications of contempt that occurred during trial.

2. Whether a trial lawyer may be found guilty of contempt for his conduct in the courtroom during a criminal trial if that conduct is not shown to have resulted in any actual obstruction of justice.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-____

ROBERT E. GOLDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert E. Goldman respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-12a) is reported at 222 F.3d 1123. The order of the district court adjudging petitioner in contempt (App. 14a-57a) is not reported. The order of the district court denying the motion to disqualify Judge Wilson (App. 61a-65a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2000. A timely petition for rehearing was denied on October 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

Title 18, United States Code, Section 401 provides, in relevant part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(b) of the Federal Rules of Criminal Procedure provides, in relevant part:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. . . . If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. . . .

STATEMENT

1. The Galin Trial.

Robert Goldman is a 68-year-old member of the New York Bar who had tried more than 300 civil and criminal cases in the federal and state courts of New York and other jurisdictions. In June 1998, Mr. Goldman represented Dr. Miles Galin, a long-time family friend and physician, in a wire-fraud and counterfeit-securities jury trial held in the United States District Court for the Central District of California. Presiding at the trial – which lasted from June 16 to June 29 – was Judge Stephen V. Wilson, whose courtroom conduct has been the subject of criticism in several reported decisions. [1]

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[1] *See, e.g.*, *Fleming v. City of Los Angeles*, 1999 U.S. App. LEXIS 16023, *7 (9th Cir. July 13, 1999) (unpublished disposition without precedential value) (Judge Wilson's "strong unjustified rebuke of counsel before the jury unfairly impugned counsel's integrity and also prejudiced Plaintiffs, by denying Plaintiffs the opportunity to present their theory of the case during closing argument."); *United States v. Moorehead*, 57 F.3d 875, 877, 879 n.2 (9th Cir. 1995) (Judge Wilson "rebuffed defense counsel's continuing efforts to object and eventually in no uncertain terms forbad defense counsel from objecting at all"; Judge Wilson's instruction to counsel to cease objections was of "arguably dubious merit" and a threat of contempt was "questionable given the ethical and constitutional obligations under which a defense counsel labors"); *United States v. Sarno*, 73 F.3d 1470, 1503 (9th Cir. 1995) (by "curtly silenc[ing]" the defendant, Judge Wilson thereby "denied [the defendant] his right of allocution"); *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 709 (9th Cir. 1989) (noting that Judge Wilson's "questioning was not marked by complete indifference. Some of his questions instead were quite pointed and intemperate"); *see also Martel v. County of Los Angeles*, 34 F.3d 731 (9th Cir. 1994) (Judge Wilson abused his discretion by imposing unduly hasty discovery and trial schedule).

2. The Court's Relentless Criticism.

During the trial, Mr. Goldman was subject to relentless and undue criticism. The court of appeals' opinion describes and quotes the judge's many "admonishments" – which it describes as "replete" in the record – over three pages of its opinion (App. 3a-7a), and notes that Judge Wilson became "exasperated with Goldman" (*id.* at 6a). During Mr. Goldman's closing argument, the prosecutor interrupted with objections 14 times (without admonishment from the bench, although many were overruled). When the prosecutor objected again during Mr. Goldman's summation, the following colloquy ensued (*id.* at 7a).

PROSECUTOR:	Objection. No evidence, Your Honor.
GOLDMAN:	It's his testimony. He said it on the stand.
COURT:	Again, you've done that.
GOLDMAN:	Your Honor, may we have the criticism once directed in this direction?
COURT:	Approach the side bar.
COURT:	[Sidebar] I am now citing you for contempt for willfully violating my order.

3. The Contempt Allegation.

The Galin trial concluded with a jury verdict of guilt. Two weeks later, on July 15, 1998, Judge Wilson filed an Order To Show Cause citing 53 specifications of contempt in violation of 18 U.S.C. § 401(1) allegedly committed by Mr. Goldman during the Galin trial. Twenty-nine of the specifications alleged that Mr. Goldman had violated an

instruction given by Judge Wilson at the inception of the trial not to "argue objections." Judge Wilson had, during a pretrial conference, told counsel, "when you make an objection, make the objection, state the legal grounds and don't argue the objection" (App. 3a). The statements made by Mr. Goldman that allegedly constituted "arguing objections" were, in most of the instances specified in the Order To Show Cause, remarks of less than ten words which preserved the defense objection to the court's ruling. *See id.* 70a-85a.

The court of appeals' opinion quoted *only* Judge Wilson's on-the-record characterizations of Mr. Goldman's conduct and statements and did not quote the text of what Mr. Goldman actually said. Below we quote, *in full*, the statements Mr. Goldman made that allegedly constituted "arguing objections."

Specification 2

MR. GOLDMAN: This is what he will say, your honor.

Specification 3

MR. GOLDMAN: Your Honor, the entire witness' –

Specification 4

MR. GOLDMAN: I object, Your Honor, no foundation. Not binding on this defendant.

Specification 5

MR. GOLDMAN: Your Honor, this is cross-examination.

* * *

MR. GOLDMAN: No, Your Honor. This witness was called by [the prosecutor]. I didn't call her.

Specification 6

MR. GOLDMAN: Straight cross, Your Honor.

Specification 7

MR. GOLDMAN: Did she convey to Mr. Baudo, Your Honor.

Specification 8

MR. GOLDMAN: Your Honor, if I can't cross-examine the witness that the government has called. I can't get to that point.

Specification 9

MR. GOLDMAN: Goes to the state of mind, Your Honor.

Specification 10

MR. GOLDMAN: Your Honor, this was the pressure that was brought to bear.

Specification 11

MR. GOLDMAN: Your Honor, may –

Specification 12

MR. GOLDMAN: It is on the tape, Your Honor.

Specification 13

MR. GOLDMAN: May I –

* * *

MR. GOLDMAN: I believe if I can just –

* * *

MR. GOLDMAN: Agent Medrano, isn't it true that the only thing that changed between the date of arrest and the date of the indictment was—

Specification 14

MR. GOLDMAN: It's her statement, Your Honor. She is here to be cross-examined.

* * *

MR. GOLDMAN: It's her statement.

* * *

MR. GOLDMAN: She's stating a fact, Your –

Specification 15

MR. GOLDMAN: Your Honor, I have offered it for the truth. The Court has admitted it for the purpose –

* * *

MR. GOLDMAN: I didn't argue an evidentiary ruling.

Specification 16

MR. GOLDMAN: Your Honor –

Specification 17

MR. GOLDMAN: This is the transcript, Your Honor, the one that [the prosecutor] has been reading from.

Specification 18

MR. GOLDMAN: May we approach, Your Honor. He brought it up.

Specification 19

MR. GOLDMAN: Your Honor, there is tag line—

Specification 20

MR. GOLDMAN: It is not speculation, Your Honor.

Specification 21

MR. GOLDMAN: May I approach, Your Honor?

* * *

MR. GOLDMAN: Your Honor, will keep in mind–

Specification 22

MR. GOLDMAN: State of mind, Your Honor.

Specification 23

MR. GOLDMAN: Take a break and let me argue outside the presence of the jury, Your Honor.

Specification 24

MR. GOLDMAN: I can't Your Honor. It explains the entire motivation for everything that follows.

Specification 25

MR. GOLDMAN: Goes to his state of mind.

Specification 26

MR. GOLDMAN: Argument, Your Honor.

Specification 27

MR. GOLDMAN: That's her testimony, Mr. Whittlesey [the prosecutor]. That's her testimony.

Specification 28

MR. GOLDMAN: I don't think so. The jury's recollection will–

Specification 29

MR. GOLDMAN: It's his testimony. He said it on the stand.

* * *

MR. GOLDMAN: Your Honor, may we have the criticism once directed in this direction.

The Order To Show Cause also charged Mr. Goldman with "failing to follow courtroom protocol" (principally walking away from the lectern) on seven occasions (App. 78a-79a), and "other misconduct" – principally speaking in a loud voice and gesturing – in 17 instances (*id.* at 85a-90a). This conduct allegedly violated the judge's instruction that "lawyers are expected to argue from the lectern" and that the "procedure" should be "dignified and not an exercise in combat" (*id.* at 3a).

4. The Disqualification Motion.

Mr. Goldman moved for the judge's disqualification under the provision of Rule 42(b) of the Federal Rules of Criminal Procedure that directs disqualification "[i]f the contempt charged involves disrespect to or criticism of the judge." Under the District's Local Rules, the motion was considered by a different judge who denied the motion to disqualify on the ground that Mr. Goldman's statements during the trial were not so inflammatory that they "reasonably could be taken to undermine [Judge Wilson's] impartiality" (App. 63a).

5. The Hearing.

The government did not participate in the contempt hearing, which was held on October 29, 1998. Mr. Goldman

testified in detail in response to each of the 53 allegations and explained that he had acted in accordance with his understanding of the judge's instructions. His co-counsel at the Galin trial, also a member of the New York Bar, testified that Mr. Goldman had complied with co-counsel's understanding of the judge's instructions and explained that Mr. Goldman's relatively loud voice were the result of years of litigation in courtrooms with poor acoustics and were attributable to hearing loss.

Mr. Goldman also presented affidavits from four leading trial lawyers in the federal and state courts in New York attesting to the fact that the statements made by Mr. Goldman would not be deemed "arguing objections" in the courts before which they customarily practice. The affidavits also noted that gesturing and occasional departures from behind the lectern are commonplace in the New York courts.

6. The Judge Rules Immediately.

After a recess of several minutes, Judge Wilson announced that he found Mr. Goldman guilty beyond a reasonable doubt of deliberately violating the court's orders and committing contempt on all 53 specifications. Judge Wilson discredited all of the evidence presented in Mr. Goldman's favor, telling his lawyer, "You weren't here. I was." 10/29/98 Hearing Tr. at 195. Judge Wilson sentenced Mr. Goldman to three days' imprisonment, which has been stayed pending final resolution of his appeal, and announced that he would be issuing a written opinion.

7. The Judge Amends the Allegation.

On January 29, 1999 – three months after the contempt hearing – Judge Wilson issued an order declaring that, in addition to the allegation that Mr. Goldman had violated

Section 401(1) that was set out in the Order To Show Cause (App. 69a & n.8), the judge was "considering making findings with respect to 18 U.S.C. § 401(3)" (*id.* at 59a) – which does not explicitly provide that a violation must "obstruct the administration of justice." *See generally id.* at 58a-60a. Mr. Goldman objected to the amendment of the charge after the hearing, but Judge Wilson denied the objection.

8. The Judge's Formal Opinion.

Nearly seven months after the hearing, on May 13, 1999, Judge Wilson filed a lengthy order in which he rejected Mr. Goldman's defenses and found him guilty under both Sections 401(1) and 401(3) (App. 15a-57a).

9. The Court of Appeals' Affirmance.

The Ninth Circuit affirmed on the basis of Judge Wilson's description of Mr. Goldman's conduct without quoting or discussing what Mr. Goldman had actually said. The court below held that Judge Wilson was acting within his discretion when he prohibited Mr. Goldman from stating the grounds on which he believed evidence was admissible (App. 7a-8a). The court also concluded that actual obstruction of justice did not need to be shown before a trial lawyer could be convicted of violating Section 401(3) by his in-court conduct (*id.* at 9a-10a). And while the court of appeals acknowledged that "it is clear that Judge Wilson at times lost patience with Goldman" because he was "flaunting [*sic*] the court's orders" (*id.* at 10a), it held that disqualification was not required because Judge Wilson was not "personally embroiled" with Mr. Goldman (*id.*).

REASONS FOR GRANTING THE WRIT

I

PERMITTING A FEDERAL TRIAL JUDGE PERSONALLY TO DETERMINE WHETHER A LAWYER DELIBERATELY VIOLATED THE JUDGE'S ORDERS REGARDING COURTROOM PROTOCOL AFTER THE JUDGE HAS RELENTLESSLY CHASTISED COUNSEL AND, *SUA SPONTE*, INITIATED RULE 42(b) CONTEMPT PROCEEDINGS VIOLATES THIS COURT'S DECISIONS AND CONFLICTS WITH THE RULINGS OF VARIOUS COURT OF APPEALS

This Court has reviewed decisions of lower courts in the sensitive area of contempt sanctions imposed on trial lawyers by judges who clashed with the lawyers during sharply contested proceedings. *See*, *e.g.*, *Taylor v. Hayes*, 418 U.S. 488 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Offutt v. United States*, 348 U.S. 11 (1954); *Cooke v. United States*, 267 U.S. 517 (1925); *see also In re Little* 404 U.S. 553 (1972). Chief Justice Taft noted in *Cooke* that exercise of the judge's power to impose a contempt sanction "is a delicate one and care is needed to avoid arbitrary or oppressive conclusions." 267 U.S. at 539. On this account, the Court held in *Cooke* that "where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place." *Id.*

Rule 42(b) explicitly prescribes that when a criminal contempt proceeding is conducted on notice, the trial judge "is disqualified from presiding at the trial or hearing except with the defendant's consent" whenever "the contempt

charged involves disrespect to or criticism of a judge." Alleged repeated deliberate violations of a judge's instructions not to "argue objections," not to depart from the lectern, and not to gesture plainly "involve disrespect" of the judge. More importantly, as Judge Wilson himself noted (App. 72a n.9), Mr. Goldman made at least two statements on the record that criticized the trial judge. On the fourth day of trial, Mr. Goldman stated in chambers that "the Court's approach to never permitting me to finish a thought . . . demonstrates a bias which I think at this point, Your Honor, is beginning to show the manner in which it is not a fair trial." *Id.* And after Judge Wilson criticized Mr. Goldman for purportedly arguing an objection during his summation, Mr. Goldman stated "Your Honor, may we have the criticism once directed in [the prosecutor's] direction?" (*id.*). Judge Wilson included both of these remarks in Mr. Goldman's contempt citation, and explicitly relied on the latter in citing him for contempt. *Id.*

Under such circumstances, the plain language of Rule 42(b) requires the disqualification of the judge. Rule 42(b) does not disqualify judges *only* where they have been criticized to such an extent that they become emotionally involved in the case. Rather, it disqualifies judges *whenever* "the contempt charged involves disrespect to or criticism of a judge." Fed. R. Crim. P. 42(b). Its language, like that of its statutory predecessor (*see* 29 U.S.C. § 112 (1940)), does not require any showing about the judge's emotional involvement in the case. The provision speaks in broad and mandatory terms and contains no exceptions.

Although this Court has not yet had the opportunity to apply the disqualification language of Rule 42(b), various federal courts of appeals have interpreted that provision in a manner that conflicts with the Ninth Circuit's crabbed interpretation of the disqualification requirement, under which Rule 42(b) does not require disqualification unless the judge is so "personally embroiled" (App. 10a) as to violate

Due Process. The Seventh Circuit has warned against "conflat[ing] the disqualification provision of Rule 42(b) and the related, though doctrinally independent, rule that an accused has the right to a fair and impartial adjudication." *United States v. Griffin*, 84 F.3d 820, 829 (7th Cir. 1986). Numerous other courts have likewise drawn a distinction between the two standards. *See, e.g.*, *In re Levine*, 27 F.3d 594, 598 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1015 (1995); *In re Grand Jury Proceedings*, 875 F.2d 927, 932 n.5 (1st Cir. 1989); *In re Pilsbury*, 866 F.2d 22, 27-28 (2d Cir. 1989); *United States v. Marx*, 553 F.2d 874, 877 (4th Cir. 1977); *In re Puerto Rico Newspaper Guild Local 225*, 476 F.2d 856, 859 (1st Cir. 1973); *see also In re Chaplain*, 621 F.2d 1272, 1278 (4th Cir.) (Phillips, C.J., concurring and dissenting), *cert. denied*, 449 U.S. 834 (1980).

Moreover, even apart from Rule 42(b), the decision of the court of appeals in this case conflicted with the ruling and rationale of both *Offutt v. United States*, 348 U.S. 11 (1954), and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). As was true in *Offutt*, the trial judge in this case "again and again admonished petitioner for what he deemed disregard of rulings and other behavior outside the allowable limits of aggressive advocacy, and warned him of the consequences by way of punishment for contempt which such conduct invited."[2] 348 U.S. at 12. In *Offutt*, unlike this case, the trial judge proceeded under Rule 42(a) with a summary disposition of contempt based on 12 specific findings. Rule 42(a) has no disqualification requirement, and the

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[2] Judge Wilson's emotional involvement in the case is demonstrated by his immediate finding of guilt on *all* 53 specifications of contempt (including even innocuous unfinished requests such as "May I–", *see, e.g.*, Specifications 11, 13, 16) and by his post-hearing, eleventh-hour decision to add a charge under section 401(3), which lacks a textual obstruction requirement. This extraordinary effort to shore up Mr. Goldman's conviction reflects an emotional involvement in the case that is inconsistent with the court's constitutional role as an impartial arbiter.

justification is greater under Rule 42(a) for prompt action by the judge before whom the alleged contempt was committed than it is under Rule 42(b), where the judge himself recognizes, by providing an opportunity for notice and hearing, that an immediate sanction is not necessary. Moreover, Rule 42(b) explicitly requires disqualification whenever "disrespect to or criticism of" the judge is involved. Nonetheless, this Court held in *Offutt* that federal district judges should disqualify themselves even in Rule 42(a) contempts, and that "the determination of petitioner's guilt and the punishment properly to be meted out on a finding of guilt should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct." 348 U.S. at 15.

In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Court had before it a record of "brazen efforts to denounce, insult, and slander the court and to paralyze the trial." 400 U.S. at 462. The record would have justified instant punishment of the contemnors. But as a matter of constitutional law, the court held that where the judge "does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place." 400 U.S. at 463-64. This Court quoted the governing observation made in *Offutt* that "justice must satisfy the appearance of justice." 400 U.S. at 465 (quoting *Offutt*, 348 U.S. at 14).

Other courts of appeals have held that brief comments impugning a judge's impartiality are, without more, sufficient to require the judge's disqualification. *See United States v. Meyer*, 462 F.2d 827, 844-45 (D.C. Cir. 1972) (court "did not have to go further" than party's allegation of judicial bias in making recusal decision); *In re Dellinger*, 461 F.2d 389, 396 (7th Cir. 1972) (statement "[t]he door in this courtroom seems to swing in one direction [against the

defendants]" required recusal); *see also Bakalis v. Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994).

But wholly apart from that, the record in this case shows "a mounting display of an unfavorable personal attitude towards petitioner, his ability, and his motives, sufficiently so that the contempt issue should [be] finally adjudicated by another judge." *Taylor v. Hayes*, 418 U.S. at 501-02. Judge Wilson's criticism of Mr. Goldman was harsh and unrelenting, and frequently wholly disproportionate to the conduct in question. A simple (and unfinished) request by Mr. Goldman – "Your Honor, may . . . " – precipitated an unwarranted torrent of criticism, accusing Mr. Goldman of "disregard[ing his] instructions" and "tak[ing] liberties." Court of Appeals Excerpts of Record ("E.R.") 234-35. Similarly, a simple effort to learn what page of a transcript corresponded to a particular tape recording drew numerous rebukes.[3]

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[3] *See* E.R. 365:

> MR. GOLDMAN: [JURY OUT] Can you tell me where on this transcript?
>
> THE COURT: Don't talk to [the prosecutor] any more.
>
> MR. GOLDMAN: I don't know where on this –
>
> THE COURT: And remove yourself from the well. Be seated.
>
> MR. GOLDMAN: Your Honor, let the record reflect, I don't know where on this transcript he is. I don't even know where to look on the transcript.
>
> THE COURT: Don't raise your voice and be seated. We are starting to listen to the tape.

A similar display of hostility – directed solely at Mr. Goldman among all those present in the courtroom – occurred when post-trial motions were discussed five days after the contempt citation. Although the prosecutor, another defense attorney, the deputy clerk, and Judge Wilson's law clerk were allowed to speak freely about a trial exhibit (E.R. 402-04), Judge Wilson refused to let Mr. Goldman speak after his initial presentation. *See* E.R. 402-05. Near the end of the hearing Mr. Goldman sought to speak, and Judge Wilson threatened to hold him in contempt

II

THE COURT OF APPEALS' HOLDING THAT A LAWYER MAY BE GUILTY OF CONTEMPT EVEN IF HIS CONDUCT DOES NOT OBSTRUCT JUSTICE CONFLICTS WITH DECISIONS OF THIS COURT AND DECISION OF OTHER CIRCUITS

This Court has long held that it is "essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases." *In re McConnell*, 370 U.S. 230, 236 (1962). "Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes . . . zeal in the opposing lawyers." *Sacher v. United States*, 343 U.S. 1, 8 (1952). Consequently, this Court has held that attorneys representing clients in a trial are entitled to wide latitude to ensure that the contempt power does not chill vigorous advocacy. "To preserve the kind of trials that our system envisages" (*McConnell*, 370 U.S. at 236), this Court has held that a lawyer cannot be held

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again for violating his directions – although there had been no "directions" he could disobey (E.R. 406):

> MR. GOLDMAN: Your Honor, I believe –
>
> THE COURT: I didn't ask for your comment. Please be seated. You are going to compel me to do something again because you don't follow my directions.
>
> * * *
>
> MR. GOLDMAN: Your Honor, please before we break?
>
> THE COURT: I don't want to hear from you now.

in contempt for his in-court conduct unless that conduct obstructs the administration of justice. (*id*) (emphasis added):

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way *create an obstruction* which blocks the judge in the performance of his judicial duty.

Accord In re Little, 404 U.S. at 555 (because advocates are entitled to "latitude in conducting [the] defense," accusing judge of bias does not support contempt conviction unless conduct actually disrupted court proceeding).

As the Seventh Circuit said in *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972):

> Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take advantage of the range of conduct that our adversary system allows. Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent [to support a contempt conviction] only if he knows or reasonably should be aware in view of all the circumstances, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.

Other courts have reached similar conclusions. *E.g.*, *United States v. Lumumba*, 794 F.2d 806, 808 (2d Cir.) (actual obstruction is required for non-summary contempt of attorney based on in-court conduct), *cert. denied*, 479 U.S. 855 (1986). *See also In re Michael*, 326 U.S. 224, 228 (1945) (obstruction "must clearly be shown in every case where the power to punish for contempt is exerted") (internal

quotations omitted); *Clark v. United States*, 289 U.S. 1, 11 (1933).

The Ninth Circuit rule applied in this case is that *any* violation of *any* minor rule – no matter how idiosyncratic and unrelated to orderly trial procedure – may result in imprisonment and stiff fines even if no obstruction of justice results. That rule endangers the adversary system by subjecting lawyers to potentially arbitrary treatment. In contempt cases, the judge acts as legislature, prosecutor, judge and jury, "'summon[ing] forth . . . the prospect of the most tyrannical licentiousness.'" *International Union v. Bagwell*, 512 U.S. 821, 831 (1994) (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring in the judgment)) (ellipses in original). The obstruction requirement is a necessary buffer to protect the adversary system from the chilling effect of criminal penalties for violations of minor rules (such as the lectern use rule at issue here), under which a lawyer could be sentenced to imprisonment, for example, for "walking to the front of the defense table" (App. 30a) to retrieve an exhibit.[4] Under the best of circumstances, "[t]rial courts . . . must be on their guard against confusing offenses to their sensibilities with obstruction to their administration of justice." *Little*, 404 U.S. at 555 (quoting *Brown v. United States*, 356 U.S. 148, 153 (1958) (ellipses in original). Where the obstruction requirement is eliminated, the risk of a chilling effect on advocacy is greatly increased.

Petitioner was cited for contempt because he stated the basis for the admissibility of evidence, because he walked to and from counsel's table on occasion, and because he spoke loudly and gestured expressively. Far from obstructing

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[4] Judge Wilson concluded that walking from the lectern to defense table to retrieve an exhibit would be contemptuous conduct, because "walking to the front of the defense table involves walking in the well of the courtroom" in violation of his courtroom rules. App. 30a.

justice, those are ordinary actions well within the province of zealous advocacy.[5] There has *never* been any allegation that petitioner was attempting to place prejudicial information before the jury. *Compare Pounders v. Watson*, 521 U.S. 982, 985-86, 990 (1997) (in violation of direct court order, counsel repeatedly mentioned defendant's likely severe punishment thereby "permanently prejudic[ing] the jury in favor of her client"); *In re Ellenbogen*, 72 F.3d 153, 157-58 (D.C. Cir. 1995) (counsel violated direct order prohibiting mention of co-conspirator's acquittal).

The prejudice is particularly severe in this case because Judge Wilson did not see fit to add the Section 401(3) charge until three months *after* the hearing in this case. Mr. Goldman had defended himself against the original Section 401(1) allegation arguing that his conduct could not conceivably have constituted an obstruction of justice.[6] The

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[5] *See, e.g.*, Fred W. Bennett, *Preserving Issues for Appeal: How to Make a Record at Trial*, 18 Am. J. Trial Advoc. 87, 107 n.97 (1994) ("An attorney has an absolute right to make and preserve a record for appeal."); Faust F. Rossi, *Evidence for the Trial Lawyer* 11 (1993) ("If counsel submits evidence for admission and opposing counsel objects, *counsel must tell the trial court all the specific grounds for allowing the evidence*.") (emphasis added).

[6] Until the decision below, the Ninth Circuit had clearly required a showing of actual obstruction before an attorney could be held in contempt based on in-court conduct. The Ninth Circuit had squarely held in *Hawk v. Cardoza*, 575 F.2d 732, 735 (9th Cir. 1978) (per curiam), that the Due Process Clause (as well as other constitutional guarantees) "requires some sort of actual damaging effect on judicial order before [a lawyer] may be held in criminal contempt . . . . This, at a minimum, is necessary to satisfy the fourteenth amendment." The Ninth Circuit similarly held in *Weiss v. Burr*, 484 F.2d 973 (9th Cir. 1973), *cert. denied*, 414 U.S. 1161 (1974), that "[t]he mere transgression of an order governing trial procedures is . . . *almost invariably insufficient* to sustain a contempt conviction." *Id.* at 980 (emphasis added). Rather, the Fourteenth Amendment Due Process Clause and the Sixth Amendment require, at a minimum, that the lawyer's conduct "pos[e] significant, imminent threats to the fair administration of justice . . . ." *Id.* at 982; *accord In re Greenberg*, 849 F.2d 1251, 1255 (9th Cir. 1988). The

defense made strategic choices based on the knowledge that Mr. Goldman was charged *only* with a crime requiring a showing of obstruction (Section 401(1), *see* App. 69a & n.8), and the retroactive addition of a new charge seriously undercut Mr. Goldman's defense. *Government of Virgin Islands v. Joseph*, 765 F.2d 394, 397 (3d Cir. 1985) (Becker, J.) (reduction from forcible rape to statutory rape rendered "consent" defense "totally ineffective" and required reversal).

III

THE ISSUES ARE IMPORTANT TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS

This is a case in which an experienced and respected trial attorney has been convicted of a crime for doing nothing

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obstruction requirement was, in every real sense, a substantive element of the offense of contempt in cases involving attorneys.

Under the Ex Post Facto Clause, the government "may not retroactively alter the definition of crimes," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), nor may it "change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Utah*, 110 U.S. 574, 590 (1884); *accord Carmell v. Texas*, 120 S. Ct. 1620, 1632-33 (2000) (law "retrospectively eliminating an element of the offense . . . or lowering the burden of proof" violates the *Ex Post Facto* Clause).

The constitutionality of retroactive application of judicial decisions altering the substantive requirements of law is currently pending before the Court in *Rogers v. Tennesee*, No. 99-6218. At a minimum, this Court should hold this case pending its decision in *Rogers*, and then take whatever further action is warranted in light of the disposition of that case.

more than what appropriately zealous trial lawyers do every day – stating the basis for the admissibility of evidence in response to objections, occasionally taking a few steps away from the lectern to handle exhibits, rephrasing questions to make them unobjectionable, and gesturing expressively. Although the contempt allegations involved criticism of Judge Wilson himself, he retained control over the trial of a case in which he was both the complaining witness and the factfinder. Judge Wilson's own recollection of events could not be tested or challenged, but he nonetheless stated explicitly that his recollection warranted discrediting all contrary evidence. Judge Wilson found petitioner had committed 53 specifications of contempt – far more than *both* the lawyers in the notorious "Chicago Seven" case *combined*. *See Dellinger*, 461 F.2d at 436-65 (38 specifications). And he rendered this across-the-board guilty verdict, based on a determination that Mr. Goldman was acting in willful disobedience of court orders on *all* 53 occasions, just minutes after the testimony was concluded.

This case raises questions of national importance that should be resolved by this Court. As the National Association of Criminal Defense Lawyers observed in its *amicus curiae* brief before in the Ninth Circuit, the district court's sweeping application of the contempt power to chill zealous advocacy in this case "has broad-reaching implications for criminal defense attorneys, and other trial attorneys" practicing throughout the nation. NACDL Court of Appeals Br. 1-2.

The ruling of the district court is a triumph of arbitrary power over the adversary process. A well-intentioned attorney, who did nothing more than represent his client vigorously, has been convicted of a crime. If permitted to stand, the Ninth Circuit's decision will chill vigorous advocacy throughout its constituent district courts and sow confusion throughout the federal courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN P. ELWOOD
Baker Botts, L.L.P.
The Warner
1299 Pennsylvania Ave, N.W.
Washington, D.C. 20004
(202) 639-7700

NATHAN LEWIN
Counsel of Record
2555 M Street, N.W.
Washington, D.C. 20037
(202) 833-5118

January 2001

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v.	
MILES A. GALIN, *Defendant*	No. 99-50356 D.C. No. CR-96 00885-SVW-01A
ROBERT E. GOLDMAN, *Contemnor-Appellant*	OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
March 7, 2000—Pasadena, California

Filed August 23, 2000

Before: Mary M. Schroeder, Thomas G. Nelson, and
Kim McLane Wardlaw, Circuit Judges

Per Curiam Opinion

COUNSEL

Nathan Lewin, Miller, Cassidy, Larroca & Lewin, L.L.P., Washington, D.C., for the contemnor-appellant.

Sangita K. Rao, Department of Justice, Washington, D.C., for the plaintiff-appellee.

Mark D. Hopson, Sidley & Austin, Washington, D.C., for the amicus curiae.

OPINION

PER CURIAM:

This is an appeal from an order of criminal contempt against a criminal defense attorney from New York who repeatedly violated the ground rules the district court had laid down for the conduct of a jury trial. The principal legal issue the attorney raises, and amicus National Association of Criminal Defense Lawyers (NACDL) supports, is that obstruction of justice is a prerequisite to criminal contempt against an attorney defending a criminal defendant. Because this interpretation is not supported by the applicable statute, 18 U.S.C. § 401(3), or by applicable case law, *see, e.g.*, *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981), and because the record reflects that the violation of the court's orders in this case was knowing and intentional, we affirm.

The attorney, appellant Robert Goldman, was defending Miles Galin in the case of *United States v. Galin*, No. CR-96-00885-SVW (C. D. Cal. filed Sept. 27, 1996), *aff'd*, 217 F.3d 847 (Table), 2000 WL 554266 (9th Cir. May 5, 2000). During a pretrial conference the district court first noted that Mr. Goldman was from outside the Central District of California and then explained the court's practices. These practices included requiring counsel to argue to the jury from the lectern rather than from the well of the courtroom and to state the legal ground for an objection without arguing the point. The court said:

> Lawyers, and I say this because I know you are out [of] the district and it's hard to know the practices of

> a Court when you are not regularly appearing in that Court, lawyers are expected to argue from the lectern. If you have need to depart from the lectern, you are to ask leave of Court.
>
> When you make an objection, make the objection, state the legal grounds and don't argue the objection. If it's important, you can always ask permission to approach the side bar, although I frown upon that, I don't like side bar conferences, or we can argue it at recess. I prefer to argue matters that were ruled upon that counsel think may need reargument at the recess.
>
> I don't want lawyers talking to each other certainly. I want the procedure to be dignified and not an exercise in combat.

Tr. of 6/12/98 Pretrial Conference at 3.

During the course of the trial, Judge Wilson made it clear that he would not permit an objecting attorney to offer argument beyond making the objection and stating the legal basis for it. Similarly, he would not permit an attorney offering objectionable evidence to argue a basis for the evidence after an objection had been sustained. During cross-examination of the government's first witness, when Goldman tried to provide a basis for a question objected to by the government, Judge Wilson told Goldman, "I told you not to argue objections." Trial Tr., Vol. 1 at 18. Numerous admonishments followed. For example, a little later in the proceedings Judge Wilson responded to an objection made by Goldman by stating, "I've asked you please to make legal objections and if further argument is necessary I'll invite it or you can request it. Make the objection, let me rule and let's please follow that process." *Id.* at 24-25. Later in the trial, after Goldman persisted in arguing a point, the court stated:

> Mr. Goldman, you know, as I said before, I certainly admire the zeal in [sic] which you have represented

> your client, but I told you that it is improper to argue before the jury unless I invite it. And you've argued an objection before the jury. That's inappropriate and contrary to my rules. And I don't want you to do it again. When I rule, I have ruled.

Trial Tr., Vol. 3 at 51. The record is replete with other examples. *See, e.g.*, *id.* at 56 ("Don't argue the objection."); Trial Tr., Vol. 4 at 88 ("I asked you not to argue in front of the jury again."); *id.* at 155 ("Please don't argue objections in front of the jury. Please don't do it."); *id.* at 157 ("Respectfully, Mr. Goldman, just 30 seconds ago I asked you please not to argue evidentiary rulings."); *id.* at 180 ("Can't you please follow my admonition and not argue objections? I've ruled."); Trial Tr., Vol. 5 at 17 ("I keep asking you not to argue objections."); *id.* at 62 ("I asked you not to argue objections. The court has ruled. Move on."); *id.* at 85 ("I'm not inviting this argument in front of the jury."); Trial Tr., Vol. 6 at 93 ("I keep admonishing you not to argue in response to an objection.").

Judge Wilson also admonished Goldman on several occasions for failing to remain at the lectern and entering the "well" of the court, and for raising his voice, waving documents, pointing, interrupting the court, and criticizing the court's rulings. *See, e.g.*, Tr. of 6/16/98 Hearing at 8 ("You know something; if we are going to be here for a week or so, I'm not going to tolerate your shouting into the microphone. . . . So modulate your voice and don't sound contentious and argumentative because your personality is irrelevant to these proceedings."); Trial Tr., Vol. 1 at 21 ("Don't approach the witness and please stay out of the well."); Trial Tr., Vol. 2 at 150 ("Keep your voice down. Can't you modulate your voice?"); Trial Tr., Vol. 3 at 28 ("Mr. Goldman, don't walk around in the well of the courtroom."); *id.* at 138 ("Don't yell at the witness."); *id.* at 251 ("Stop screaming. You are yelling at him."); Trial Tr., Vol. 4 at 25 (during a sidebar: "You're speaking too loudly.

You are again speaking so loudly the jury [can] hear you."); *id.* at 27 ("Let me finish - [Goldman interrupts] Let me finish my point and we will proceed."); *id.* at 28 ("You don't allow me to complete my thoughts. You keep saying, 'No. No.'"); *id.* at 35 ("You are not letting me complete my thought."); *id.* at 44-45 ("Mr. Goldman, once again you shouted, pointed your finger four or five times at the jury and at the witness. . . . I implore you, please don't disregard my instructions. Please don't shout and point your finger at the witness."); *id.* at 158 (during a sidebar: "Mr. Goldman, please don't argue so loudly so the jury can hear."); Trial Tr., Vol. 5 at 86 ("Please don't march around the courtroom. Position yourself near or at the lectern. I have asked you to do that several times. Please comply with my order."); *id.* at 94 ("That's an inappropriate question. Don't comment on the court's ruling. Ask the question in a straightforward way, please."); *id.* at 105 ("You are walking in the well. You are not standing where I asked you to."); *id.* at 112 ("You continually stand in the well. Stand in back of the lectern."); *id.* at 187 ("Don't yell and point your finger at me. . . . Put that finger down and don't yell."); Trial Tr., Vol. 6 at 61 ("Please, I told you before the argument to argue from behind the lectern. . . . Follow my admonition. Don't make me interrupt your argument. You are an able lawyer.").

Several times during the trial, the district court expressed its exasperation with Goldman's failure to follow his previous orders not to argue objections. *See, e.g.*, Trial Tr., Vol. 4 at 149 ("I don't know how many times I've asked you not to argue the objection."); Trial Tr., Vol. 5 at 20 ("I told you not to argue objections and you're violating that order."); *id.* at 25 ("I've asked you at least 20 times during this trial to not argue objections before the jury."); *id.* at 87 ("I asked you not to argue in front of the jury. You do that every time in violation of my order. That's inappropriate. . . . Now don't violate my order any more."); Trial Tr., Vol. 6 at 106 ("For the 30th time I've asked you not to argue in front of the jury

until I seek argument."). On at least three occasions, Judge Wilson's admonishments took the form of warnings. *See* Trial Tr., Vol. 2 at 162 ("If you persist in disrupting my regulation of the trial, you are going to put me in a very uncomfortable position, which I don't want to be placed in."); Trial Tr., Vol. 4 at 30-31 ("Don't tell me no again. If you do one more time, if you interrupt one more time in that fashion, I will be compelled to do something I don't want to do. That is the last warning you have."); Trial Tr., Vol. 5 at 187 ("And let me tell you this now that I have finally reached of [sic] wits end. I cannot manage this case. Your conduct is intolerable and I've resisted this for four or five days, but I am now telling you as a last resort because I cannot deal with this any longer, that if you persist any longer in violating my instructions and directions, I am going to cite you for contempt.").

After becoming exasperated with Goldman toward the end of the trial Judge Wilson repeated his orders, stating:

> Let me make it even clearer for you; one, you are not to argue objections.
>
> Two. As I said at the outset, you are to stand up, make an objection and give a legal ground and wait for a [ruling].
>
> Three. You are not to wander around the courtroom, especially in the well of the courtroom.
>
> And four, you are not to shout and point fingers at me or anyone else.
>
> And five, you are not to engage in discussions with the prosecutor or anyone else unless the Court gives you leave to do so.

Id. at 187-88.

Finally, during Goldman's closing argument, the following exchange took place:

PROSECUTOR: Objection. No evidence, Your Honor.

GOLDMAN: It's his testimony. He said it on the stand.

COURT: Again, you've done that.

GOLDMAN: Your Honor, may we have the criticism once directed in this direction?

COURT: Approach the side bar.

COURT: [Sidebar] I am now citing you for contempt for willfully violating my order.

Trial Tr., Vol. 6 at 107.

After the trial, Judge Wilson issued an order to show cause why Goldman should not be held in contempt. Goldman then requested that Judge Wilson disqualify himself from presiding over Goldman's contempt hearing. The matter was reassigned to Judge George King, who denied Goldman's motion for recusal of Judge Wilson. After a contempt hearing, the court found Goldman guilty of criminal contempt under 18 U.S.C. §§ 401(1) and (3) and sentenced him to three days in jail.

WHETHER GOLDMAN'S CONDUCT WAS APPROPRIATE

Goldman first contends that the conduct should not have been punishable for contempt because when he argued objections he was merely protecting his record for appeal. He points out that Rule 51 of the Federal Rules of Criminal Procedure "requires a party to state the specific grounds upon which the evidence is admissible." *See United States v. Muniz*, 684 F.2d 634, 640 (9th Cir. 1982).

Goldman, however, never indicated that preservation of the record was his intent. More important, none of the cases cited by Goldman hold that an offer of proof must be made in the presence of the jury. In fact, Rule 103 of the Federal Rules of Evidence, which requires a "timely" objection or offer of proof to preserve an issue for appeal, specifically states that "in jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." Fed. R. Evid. 103(c).

Moreover, even if the district court had adopted an impermissible practice, the attorney's remedy would have been to raise the issue on appeal, rather than repeatedly violating the court's instructions. *See Maness v. Meyers*, 419 U.S. 449, 458 (1975) ("If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal."); *United States v. Dowdy*, 960 F.2d 78, 81 (8th Cir. 1992) ("Once a judge has ruled, the recourse of a zealous advocate lies in challenging the legality of that ruling on appeal, not in denigrating the wisdom and fairness of the court."); *Pennsylvania v. Local Union 542, Int'l Union of Operating Engineers*, 552 F.2d 498, 508 (3d Cir. 1977) ("[A] trial attorney's belief that certain action is necessary to protect the record for appellate review does not excuse his deliberate defiance of the trial judge's explicit and repeated orders").

For its part, the district court told both counsel of its concern about the effect of argument on the jury, and advised counsel that if necessary they could approach the bench for further discussion. This was in accordance with Fed. R. Evid. 103. While the rules do not expressly require district judges to adopt practices like that of Judge Wilson, a district court is acting within its discretion in doing so.

WHETHER OBSTRUCTION OF JUSTICE IS A PREREQUISITE TO A FINDING OF CRIMINAL CONTEMPT UNDER 18 U.S.C. § 401(3)

Goldman, with the support of amicus NACDL, contends that obstruction of justice was required to support his contempt conviction under 18 U.S.C. § 401(3). In its entirety, Section 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401.

The statutory language of Section 401(3) contains no requirement of obstruction of justice, but Goldman and the NACDL argue for a special rule applicable to criminal defense attorneys. They maintain that the defendant's Sixth Amendment right to a fair trial is implicated by contempt orders against criminal defense counsel. There is no authority supporting such an exception to Section 401(3). The statute requires only that there has been "disobedience or resistance" to a court's "lawful writ, process, order, rule, decree, or command."

Subsection 3 is in contrast to Subsection 1, which does expressly require a finding of obstruction, because Subsection 1 is predicated on "misbehavior" rather than the violation of an express order. In fact, in the primary Ninth Circuit case cited by Goldman, *United States v. Thoreen*, 653

F.2d 1332 (9th Cir. 1981), this court discussed actual obstruction in the context of 18 U.S.C. § 401(1) - which, as noted above, indisputably requires actual obstruction of justice. The *Thoreen* court began its analysis by describing the elements of §§ 401(1) and (3), specifically mentioning actual obstruction in the context of § 401(1) but not in the context of § 401(3). *See Thoreen*, 653 F.2d at 1339.

Here, the district court did find that Goldman's conduct actually obstructed the administration of justice because it continued in the face of repeated warnings and chastisements. The district court had to chastise Goldman on more than two dozen occasions for arguing objections, entering the well of the courtroom, raising his voice, interrupting the court, waving documents, and pointing. Regardless of whether these incidents together or in isolation amounted to obstruction of the administration of justice under Section 401(1), Goldman's repeated disobedience deservedly risked a contempt sanction under Section 401(3). *See In re Gustafson*, 650 F.2d 1017, 1020 (9th Cir. 1981) (en banc) (upholding contempt conviction of lawyer who "repeatedly ignored objections sustained by the court to the speed and content of his argument . . . [and] disregarded the judge's instructions as to permissible argument"). The conduct merited the sanction of criminal contempt under 18 U.S.C. § 401(3).

ALLEGED DISQUALIFICATION OF TRIAL JUDGE

Due process requires recusal of a judge who has become personally embroiled in a controversy and cannot therefore adjudicate it fairly. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971); *Offutt v. United States*, 348 U.S. 11, 17 (1954). Goldman contends that a different judge should have presided at his post-trial contempt hearing. Although it is clear that Judge Wilson at times lost patience with Goldman on the basis of the court's belief that Goldman was flaunting [*sic*] the court's orders, the record does not support a contention that the judge was so "personally embroiled" with

Goldman that disqualification was necessary. *See id.* Here, as the Seventh Circuit observed in *United States v. Griffin*, 84 F.3d 820, 831 (7th Cir. 1996), "nothing in the record suggests that [the district judge's] understandable frustration at trial tainted his ability to discharge his judicial duty at the posttrial contempt hearing." *Accord Liteky v. United States*, 510 U.S. 540, 555-56 (1994) (stating in the context of 28 U.S.C. § 455(a) that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. . . . Not establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.").

Although he repeatedly admonished Goldman for violating courtroom protocol, Judge Wilson exhibited restraint, patience, and respect toward Goldman throughout the trial. *See, e.g.*, Trial Tr., Vol. 2 at 127 ("Please, Mr. Goldman, I mean you are an able lawyer. Your inflections don't add or subtract to [sic] the substance of your questions. Zeal for your client is expected, but please temper it somewhat; would you?"); Trial Tr., Vol. 3 at 51 ("Mr. Goldman, you know, as I said before, I certainly admire the zeal in [sic] which you have represented your client."); Trial Tr., Vol. 4 at 58 ("I thought your cross-examination was quite appropriate, and as it turns out, that we may just have not quite understood each other. In any event, I think you've developed some good points."); Trial Tr., Vol. 5 at 63-64 (Judge Wilson asked Goldman to explain his position, stating "perhaps I'll reverse my ruling"; after the explanation, the ruling was reversed).

In sum, the record reflects that the district court strictly enforced its rules as they were laid out to counsel in advance and retained its objectivity in ruling upon disputed points during trial. Goldman's conviction of criminal contempt was

supported by the evidence. Judge Wilson did not err in presiding over Goldman's contempt hearing.

The judgment and order of criminal contempt are AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America, Plaintiff-Appellee,	)	No. 99-50356
v.	)	D.C. No. CR-96 00885-SVW-01A
Miles A. Galin, Defendant	)	ORDER
Robert E. Goldman, Contemnor-Appellant	)	

Before: SCHROEDER, T.G. NELSON, and GRABER,[1] Circuit Judges

The panel as constituted above has voted to deny the petition for hearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

[1] By order filed October 23, 2000, this order was amended to correctly indicate that Judge Kim McLane Wardlaw was the third member of the panel.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MILES GALIN, Defendant.	)	CR 96-885(a) SVW JUDGMENT
ROBERT E. GOLDMAN, Contemnor	)	

In accordance with the Court's Order of May 13, 1999, IT IS ADJUDGED that Contemnor Robert Goldman shall be held in contempt of Court in violation of 18 U.S.C. §§ 401(1) & 401(3). It is the JUDGMENT of the Court that Contemnor Goldman is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of three days.

IT IS SO ORDERED.

Dated: May 13, 1999

/s/
STEPHEN V. WILSON
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MILES GALIN, Defendant.	)	CR 96-885(a) SVW ORDER
ROBERT E. GOLDMAN, Contemnor	)	

I. BACKGROUND

Robert E. Goldman ("Goldman") represented defendant Miles Galin in his criminal trial. The trial commenced on June 16, 1998, and the jury returned a guilty verdict on June 29. On June 24, 1998, the Court cited Goldman for contempt. On July 15, 1998, the Court issued an Order to Show Cause ("OSC") why it should not hold Goldman in criminal contempt for his conduct at the trial. The OSC, which provides the necessary background for this Order, outlined in detail the many instances in which Goldman had violated the Court's explicit Orders by arguing objections in front of the jury, failing to follow courtroom protocol, and engaging in other misconduct during the course of the trial. *See* OSC Appendices [App. 75a-90a]. The OSC directed Goldman to submit a written response by August 3, 1998, and set a hearing on the matter for August 10, 1998. On July 29, 1998, Goldman filed an ex parte application to withdraw the OSC until after the conclusion of the underlying criminal proceedings. The next day, the Court agreed, in part, and reset the hearing on the OSC for September 8, 1998.

On September 1, Goldman filed his response to the OSC. That response included a request to disqualify this Court from presiding over the hearing of Goldman's contempt. Accordingly, on September 3, 1998, the Court, pursuant to General Order 224, referred the matter to the Clerk of the Court for reassignment to consider the recusal motion. The Clerk of the Court randomly assigned the matter to the Honorable George King. Due to the reassignment, this Court took the matter off of its active calendar pending Judge King's resolution of the recusal request. On September 16, 1998, Judge King filed an order denying Goldman's motion to recuse this Court. Accordingly, on September 18, 1998, the Court set the hearing on the Order to Show Cause for October 15, 1998.

On October 2, 1998, Goldman filed an ex parte application to request that the Court postpone the hearing, until October 29, 1998, and schedule a status conference. Later that day the Court agreed and set a status conference for October 19, 1998, and the hearing for October 29.

At the October 19, 1998, status conference, counsel for Goldman discussed the manner of proceeding at the contempt hearing and their potential witnesses. The Court denied Goldman's request to cross-examine the Court but granted his request to interview Court personnel, including the Court's past law clerks, regarding what they saw or heard in the courtroom during the trial and allowed Goldman to call those individuals as witnesses. Goldman interviewed some Court personnel but did not avail himself of the opportunity to call them as witnesses at the hearing.

On October 29, 1998, the Court conducted an evidentiary hearing on the Order to Show Cause. At the conclusion of the hearing, the Court found Goldman in criminal contempt of Court, and sentenced him to three days incarceration. The Court stayed the execution of the judgment pending appeal. During the preparation of its findings, the Court observed

that the OSC inadvertently only cited subsection one of the 18 U.S.C. section 401 for the Court's authority to hold Goldman in contempt. Because the Court intended to enter findings based on subsection three as well, on January 29, 1999, the Court allowed Goldman a supplemental brief to address that issue. This Order represents the Court's findings of fact and conclusions of law in this matter.

II. DISCUSSION

The Court has considered Goldman's pleadings in response to the Court's OSC, the testimony and arguments of counsel at the hearing, and the Court's percipient observations of Goldman at the trial. This Order will deal with each of the categories of content as outlined in the OSC.

A. Arguing Objections Before the Jury

Goldman offered several explanations for his conduct as described in Appendix B, pages 13 to 17, of the OSC [App. 75a-82a]. He contends that he never deliberately violated any Court order and that he never knowingly or willfully argued any objection. He claims that, in his mind, he did not argue objections in front of the jury for four reasons:[1] (1) the Court never clearly instructed him not to "argue objections" because the pretrial instruction only appeared to apply to the person making the objection; (2) Goldman merely stated a legal ground, and occasionally made an offer of proof, in response to objections by the Assistant United States Attorney, Brent Whittlesey ("Whittlesey")[2]; (3) Federal Rule of Evidence 103 requires such action in order

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[1] Mr. Jeffrey Eilender ("Eilender"), Goldman's associate at the trial, also testified at the hearing on this matter. Eilender largely repeated, often in fairly conclusory fashion, Goldman's testimony. The Court disagrees with Eilender's characterization of the events and relies on its own percipient observations as a basis for its conclusions.

[2] Goldman concedes that he did argue objections even under the strictest interpretation of the word on at least two occasions. *See* Response to Order to Show Cause at 18 ("Response").

to provide the Court with appropriate information to decide the merits of the objection and to protect the record for appeal; and (4) Goldman acted in accordance with his habit that he developed in New York state and federal courts which require such responses.[3]

The Court rejects Goldman's explanations for the following reasons: First, his proffered interpretation of the Court's pretrial Order is unreasonable and the Court does not credit it. At the pretrial conference, the Court advised the lawyers that "[w]hen you make an objection, make the objection, state the legal grounds and don't argue the objection." Transcript of June 12, 1998, Pretrial Conference at 3. A reasonable interpretation of those instructions would inform the lawyers that the Court did not want either of them to argue objections before the jury – not just the lawyer initiating the objection. The Court's subsequent statement further clarified the intent of its instruction. Immediately following the quoted sentence above, the Court commented that "[i]f it's important you can always ask permission to approach the side bar, although I frown upon that, I don't like side bar conferences, or we can argue it at recess. I prefer to argue matters that were ruled upon that counsel think may need reargument at the recess." *Id.* The Court finds that this instruction clearly ordered Goldman not to argue objections, whether Goldman initiated the objection of [*sic*] argued against the Court's ruling regarding the objection.

Even assuming the [*sic*] Goldman's strained interpretation has some validity, the Court's rulings at the outset of the trial belie that interpretation. The second specification out of twenty eight in the OSC contains the following colloquy:

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[3] The Court will discuss Goldman's claim of habit in section D below.

MR. WHITTLESEY: Objection. Calls for speculation. Argumentive.

THE COURT: Sustained.

MR. GOLDMAN: Your Honor, the entire witness' –

THE COURT: I told you not to argue objections . . . . (Vol. I, 18: 9-16)

This exchange occurred at the eighteenth page of the transcript of the trial proceedings, almost immediately after opening statements. The Court instructed Goldman not to argue an objection immediately after Goldman spoke in response to an objection made by Whittlesey. At that point, Goldman must have realized that the prohibition on "arguing objections" applied to both lawyers, not just the one making the objection. No lawyer, much less an experienced lawyer such as Goldman, could have mistaken the scope of the Court's instruction at that point. Yet Goldman proceeded to make similar statements more than twenty times during the remainder of the trial.

Goldman made such statements despite the fact that the Court repeatedly warned him not to do so. On nineteen occasions other than the one cited above, the Court explicitly instructed Goldman not to argue objections. *See* Order to Show Cause Appendix B [App. 75a-82a]. On many of those occasions, the Court also clearly informed Goldman that his actions violated the Court's Order with respect to objections.

When the Court's repeated warnings did not dissuade Goldman from violating the Orders of the Court, the Court attempted to gradually escalate those warnings. For instance, early in the trial, the Court stated "I've asked you please to make legal objections and if further argument is necessary I'll invite it or you can request it. Make the objection, let me rule, and let's please follow that process." Vol. I, 24-25. Later in the trial, the Court told Goldman "The objection has been sustained. Mr. Goldman, you know,

as I said before, I certainly admire the zeal in which you have represented your client, but I told you that it is improper to argue before the jury unless I invite it. And you've argued an objection before the jury. That's inappropriate and contrary to my rules. And I don't want you to do it again. When I rule, I have ruled." Vol. III, 50.

Later in the trial, the Court stated

> Overruled is overruled and be seated. Would the jury please step out for a moment. [JURY OUT] Mr. Goldman, I'm about to reach the end of my patience with you. And I want to say this to you in a calm but clear manner.
>
> You refuse to follow my instructions. Your views about my rulings I respect and you can make those arguments if it comes to it at a later time. But one thing you have to do is follow my instructions.
>
> When I ask you not to argue objections or to comment on things that I say, those are not for discussion. If I have been unfair with you in some way, I'm certain that a reviewing court will pass upon that.
>
> But you have disregarded my instructions and taken liberties that in my view are uncalled for. I cannot admonish you before the jury because I don't want to have your client affected by anything that I say to you.
>
> But this is the last warning. When I make a ruling and I sustain an objection, overrule an objection, that's the ruling.

Vol. III, 72-73.

Despite the strong language in that warning, the Court afforded Goldman further warnings throughout the remainder of the trial. After ten additional warnings, the

Court then commented that "I asked you not to argue in front of the jury. You do that every time in violation of my order. That's inappropriate. You're going to have an opportunity to argue the case at the end. Now don't violate my order any more. Ask another question." Vol. V, 86-87. In the penultimate instance, the Court stated that "for the 30th time I've asked you not to argue in front of the jury until I seek argument. The objection is sustained." Vol. VI, 106. Finally, the Court instructed "Approach the side bar. [SIDEBAR] I am now citing you for contempt for willfully violating my order. Proceed with your argument." Vol. VI, 107.

The Court gave all of the warnings above specifically with respect to Goldman's violation of the Order to not argue objections in front of the jury. As the Court will point out below, the Court followed a similar approach providing escalating warnings with respect to other violations as well.

The Court also finds no merit in Goldman's suggestion that he only attempted to state legal grounds for the objections. The Court's instructions at the pretrial conference required the lawyer who made the objection, not the lawyer opposing the objection, to state the legal grounds for the objection. That is, the Court's instructions at the pretrial conference required the objecting lawyer to state the objection and its legal grounds and then instructed both lawyers not to argue the objection in front of the jury. The Court's rule allowed a layer to say, for example, "Objection calls for speculation." That statement represents an objection and its legal grounds. As Goldman took such care to point out at the hearing, however, only two of the twenty eight specifications of the OSC related to times when Goldman initiated the objection. Thus twenty six times Goldman made statements of what he now claims were "legal grounds" to an objection he did not make. From the outset of the trial, the Court's instructions clearly forbade this. Again, however, even if the Court had not given an

instruction, Goldman could not possibly have misunderstood, after warnings during the trial, that he should not make such statements of "legal grounds" in front of the jury.[4]

Second, in a similar vein, even if the Court believed that Goldman misunderstood the Court's initial Order, or even if the Court had not given Goldman any instruction at all at the pretrial hearing, Goldman responded to Whittlesey's objections on more than twenty occasions after the Court instructed Goldman not to do so. *See* Order to Show Cause, Appendix B [App. 75a-82a]. It is inconceivable that Goldman who claims to have participated in more than three hundred trials, could misunderstand, after multiple warnings

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[4] The Court also does not accept Goldman's position that he merely offered "legal grounds." Even if one could offer "legal grounds" in this situation, which the Court expressly forbade, his comments often did not amount to any legal argument at all. For example, the following exchange occurred during the trial:

> WHITTLESEY: Objection; Speculation.
>
> THE COURT: Sustained.
>
> GOLDMAN: It is not speculation, Your Honor.
>
> THE COURT: I've asked you at least 20 times during this trial to not argue objections before the jury. I have ruled and please ask your next question.

Vol. V, 25: 4-9. At the hearing, Goldman explained that in this instance he did not intend to argue the objection but possessed a factual basis for continuing with the inquiry, which he ultimately brought out through further questioning. Whether or not Goldman had that intent, it strains credulity to suggest that the comment "[i]t is not" represents anything but an argument against the objection and, at that point, the Court's ruling. This reflects the larger issue: whatever Goldman's reason for speaking after Whittlesey's objections, and often even speaking after the Court had ruled, his statements attempted to resist the objection, or establish a record to challenge the objection later. This amounts to an argument against the objection and he repeatedly made such statements in front of the jury.

by the Court, that he should not make comments after Whittlesey made an objection.[5]

Third, Federal Rule of Evidence 103 did not require Goldman to argue objections and he knew the procedure for doing sidebar or at a recess if he felt it was required. Federal Rule of Evidence 103 states, in part,

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> > (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
> >
> > (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
> >
> > . . .
>
> (c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested

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[5] Goldman points out in his papers that the Court sometimes requested an explanation of the grounds upon which the proponent sought to offer evidence. *See* Response at 24 n.9. Goldman infers from that practice that the Court's instruction did not prohibit such statements. This practice actually demonstrates the exact opposite. The Court's instruction prohibited lawyers from making such statements unless, of course, the Court invited a lawyer to do so. Put another way, Goldman was not to explain the grounds for his objections. The times that the Court needed further explanation, the Court asked for it. This provided Goldman with another clear illustration about when he should explain and when he should not.

> to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
>
> . . .

Nothing in Rule 103 requires a lawyer to argue an objection as Goldman did at trial. To the contrary, Rule 103(c) emphasizes the rationale for not allowing lawyers to argue questions of admissibility before the jury. Lawyers must state a specific ground for their objections if they wish to preserve that ground for appeal. Similarly, a lawyer who opposes an objection may make an offer of proof so that the Court may rule after receiving a full presentation of the evidence. The rule explicitly encourages an lawyer to make "statements or offers of proof" outside the presence of the jury.[6] Fed. R. Evid. 103(c). Rule 103 only required that Goldman, if he felt that the Court had erroneously ruled to exclude certain testimony, inform the Court that Goldman desired to make an offer of proof and then make that offer of proof at a sidebar or recess in the trial.[7]

Various courts have allowed lawyers to offer proof at a later stage in the trial and still object on appeal. *Murphy v. City of Flagler Beach*, 761 F.2d 622, 626 (11th Cir. 1985) (allowing lawyer to object to evidentiary ruling on appeal

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[6] "Quite obviously, the purpose of the procedures set out in Rule 103(a) and (b) could be wholly defeated if the jury were permitted to overhear a proffer of excluded evidence . . . ." Weissenberger, *Federal Evidence* § 103.4 (2d ed. 1995).

[7] As the Court will discuss below, Goldman demonstrated at times during the trial that he knew the correct method to express his concerns over objections, or provide offers of proof, at sidebars or recesses. Nevertheless, even if the Court actually prevented Goldman from making an offer of proof, the Rule would not require him to argue with the Court or attempt to make the offer in the presence of the jury. Instead, the refusal by the Court would "excuse the making of an offer." *See* Graham, 1 *Handbook on Federal Evidence* at § 103.7 and cases cited *infra*.

after lawyer waited until a conference on evidentiary questions to make an offer of proof because the purpose of Rule 103 is to "give the trial judge a chance to correct errors which might otherwise require a new trial"); *Fidelity S. & L. Ass'n v. Aetna Life & Cas. Co.*, 647 F.2d 933, 937 (9th Cir. 1981) (approving the district court's decision during the trial to require a written offer of proof instead of question and answer form); *United States v. Neilson*, 471 F.2d 905, 907 n.** (9th Cir. 1973) (disapproving trial court's decision to allow offer of proof after the jury began deliberations and noting that such an offer "should be made before the parties rest and the jury retires to its deliberations"). Other cases illustrate reviewing courts' preferences for conducting evidentiary discussions outside of the presence of the jury. *United States v. Ledesma*, 632 F.2d 670, 674 (7th Cir. 1980) (finding a "no sidebar" practice contrary to Federal Rule of Evidence 103(c), because that practice conflicts with the requirement that proceedings occur outside the presence of the jury, but affirming due to the lack of prejudicial error in that case).

A fairly recent article in the American Journal of Trial Advocacy describes the well-established practice that Goldman should have followed at the trial. Fred Bennett, *Preserving Issues for Appeal: How to Make a Record at Trial*, 18 Am. J. Trial Advoc. 87 (1994). The author states that "[w]hen the court has excluded evidence on direct examination, the proponent must: (1) ask for permission to approach the bench or for an out-of-court hearing; (2) state that he intends to make an offer of proof; (3) state what the witness would have testified to if the judge had permitted the proponent to pursue the line of questioning . . . ." *Id.* at 105-06. The article also instructs that the "offer may be made at a bench conference or in open court with the jury excused. If the court does not allow counsel to make the offer of proof, counsel can still preserve error if he puts the offer of proof in written form and files the pleading as part of the trial court

record." *Id.* at 106-07. The author concludes that an "offer of proof should always be made outside the presence and hearing of the jury, regardless of whether the offer of proof is an attorney narrative or a witness question and answer offer of proof." *Id.* at 109.

In support of his argument that Rule 103 required his actions at the trial, Goldman introduced a copy of a section of the student edition of *Weinstein's Evidence Manual*. That manual does not support his argument. Instead, it demonstrates that Goldman did not need to attempt to make his offer of proof, or state his legal grounds, as an argument in response to an objection, but could have waited until a sidebar or a recess. The selection introduced by Goldman at the hearing, section 2.03[01]-2.03[04], states that an "offer of proof need not be made where it would be futile and would only result in an unseemly argument with the court – as where the trial judge prevents a formal offer. Prompt filing of a written proffer may be helpful should the judge be non-cooperative."

More importantly, Goldman's conduct at trial contradicts his recent self-serving excuse for his behavior. First, at the trial, Goldman never mentioned his reliance on Rule 103. Second, Goldman's behavior demonstrated that he did not feel that Rule 103 required him to argue objections. On at least twenty nine occasions during the trial, Goldman requested a sidebar or a recess instead of immediately arguing an objection. *See* TT Vol. I: 58; Vol. II: 15, 49, 59 (twice), 76, 78, 89, 116-17, 143, 145; Vol. III: 32, 50, 57-58, 73-74, 189; Vol. IV: 41, 43, 53, 81, 83, 150, 155, 157, 169, 231; Vol. V: 17, 61; Vol. VI: 115.[8] This demonstrates that Goldman knew that he had another method to raise his objections.

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[8] On at least half of these occasions, the Court granted Goldman's request. In other situations, the Court called sidebars or recesses without a request from either side. *See, e.g.*, TT Vol. II: 56; III: 73-74, 214.

Goldman's testimony at the hearing emphasizes these points. Goldman suggested that sometimes after he argued objections the Court reversed its rulings or allowed a certain line of inquiry and that this demonstrates that Goldman acted reasonably. Instead, this testimony highlights that the Court remained open to consider Goldman's objections and offers of proof, *but not in the presence of the jury*.

Finally, even if Goldman believed that he was compelled to argue objections, or that the Court had made an incorrect decision, he did not have license to disobey a Court Order. This clear rule of orderly administration has existed for more than one hundred years. In *Maness v. Meyers*, Chief Justice Burger announced that:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect. . . . This principle is especially applicable to orders issued during trial.

419 U.S. 449, 458-59 (1975).

The Court does not credit Goldman's proffered explanation that he did not intend to argue objections in front of the jury. The Court's pretrial instructions prohibited arguing objections in jury's [*sic*] presence and any strained view to the contrary was eliminated once trial began. Goldman did not believe that he had to violate the Court's Order to protect his client because he knew the proper way to preserve his objections and offers of proof for appeal. In addition, even if Goldman felt compelled as an advocate to argue as he did or even if the Court's Order was inappropriate, he did not have the right to ignore the Order of

the Court. In light of the above, the Court finds that Goldman's repeated violations of Court Orders were willful, intentional, and contumacious.

B. Failing to Follow Courtroom Protocol

In this section of the OSC, Appendix C, page 19 [App. 83a-84a], the Court pointed out that Goldman, on a number of occasions, walked in the well of the courtroom and approached witnesses without the Court's permission. At the pretrial conference, the Court stated: "Lawyers, and I say this because I know you are out [of] District and it's hard to know the practices of a Court when you are not regularly appearing in that Court, lawyers are expected to argue from the lectern. If you have need to depart from the lectern, you are to ask leave of [the] Court." Pretrial Conference Transcript at 3. The purpose of this rule was not to make the lawyers wooden soldiers but to allow some movement without permitting the lawyers to move about the courtroom at will which may distract the jury. Whatever Goldman thought of this Order, he was required to follow it.

Goldman offers three explanations for his behavior. First, he contends that lawyers always walk around the courtroom in the courts of New York, which he describes as smaller than this Court's courtroom.[9] Second, he argues that the Court gave a vague initial instruction which required Goldman to stand "at or near" the lectern. Thus, Goldman claims, he thought he could stray from the lectern as long as he remained "near" it.[10] Third, Goldman provides an explanation and context for what he believes he did in each

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[9] Again, the Court will discuss the habit argument below.

[10] As noted above, the Court's initial instructions did not mention "at or near" the lectern. Goldman refers to the Court's statement after the third time that Goldman walked into the well. On that occasion the Court stated "[p]lease don't march around the courtroom. Position yourself near or at the lectern. I have asked you to do that several times. Please comply with my Order." TT Vol. V, 86.

specification of the OSC. Goldman's defense reduces to one basic proposition: he claims that he thought he could stand near the lectern and he never strayed far from it. He explains that on several occasions he only moved to one side of the lectern to reach the defense table or prosecution table, but never walked any farther.

The Court rejects these arguments for several reasons. First, the Court observed that Goldman strayed significantly farther from the podium than he admitted at the hearing. The well of the courtroom extends from the front of the lectern to the bench flanked by the two counsel tables. If Goldman had merely taken a few steps to either side of the lectern, the Court would not have commented on his movement and it would have fit within reasonable interpretation of the Court's instruction to remain "near or at" the lectern. Instead, Goldman took steps significantly to the side and in front of counsels' tables on a number of occasions. For example, in the instance outlined in the fourth specification of the Order to Show Cause, the Court actually pointed out the area that comprises the well to Goldman and the jury.[11] The record thus demonstrates that Goldman had not merely strayed within a step or two of the lectern. *See* TT, Vol. V, 105.

Second, Goldman knew the meaning of the Court's clear Order. Goldman admits that he apologized after the first two admonishments from the Court, despite the fact that he felt that he had barely moved from the lectern. The Court finds, as above, that Goldman made much more significant movements away from the lectern and into the well on those occasions. Nevertheless, whatever Goldman now asserts as the explanation for or extent of his movements, he cannot dispute the fact that the Court reprimanded him for his actions and, as noted above, even pointed to the boundaries

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[11] The visual demonstration did not deter Goldman from walking into the well of the courtroom on three more occasions as outlined in the OSC.

of the well. Even if Goldman found an ambiguity in the Court's original Order, he could not doubt the meaning of the Order as applied by the Court during trial. In other words, while Goldman finds it significant that the Court repeated the "at or near" language later in the trial, he must have known that the Court interpreted "at or near" more narrowly than he did because the Court repeatedly reprimanded his movements.

Third, while Goldman now explains his motives for walking around the courtroom, such as going to get a note from Eilender or the indictment from Whittlesey, he concedes that he walked in the well of the courtroom.[12] For example, Goldman explained that he walked toward the front of the defense table to get a note from his associate, Eilender. HT at 99. Even under Goldman's view of the facts, walking to the front of the defense table involves walking in the well of the courtroom. In another instance, the record clearly reflects the extent of Goldman's actions and his apology for them. At a sidebar conference, the Court explained that "I don't like proceeding where people pick up transcripts, wave them around and bolt from the lectern into the well as if you were going to attack the witness. That's not the style here." Goldman responded, "[i]t was inadvertent." TT Vol. II, 90: 2-10.[13] For all these reasons, the Court finds that Goldman

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[12] As noted above, Eilender, also testified that he did not feel that Goldman walked around the courtroom. However, Eilender's testimony also conceded that Goldman strayed from the podium. *See* HT at 173-75. In any event, the Court observed, contrary to Eilender's testimony, that Goldman strayed far from the lectern in violation of the Court's Orders.

[13] Goldman points out that the Court accepted his apology and cannot use this behavior as a basis for contempt. The fact that the Court treated Goldman professionally and with respect after one incident does not suggest that the Court cannot find Goldman in contempt for his repeated violations. The Court does not base its finding of contempt on this particular incident. Nevertheless, the Court finds it readily apparent that the record flatly contradicts Goldman's explanations at the hearing of the limited nature of his violations.

intentionally violated the Court's Order by walking, on a number of occasions, in the well of the courtroom after repeated instructions not to do so.

C. Other Misconduct

In the final section of the OSC, Appendix D, pages 21 to 24 [App. 85a-90a], the Court explained that Goldman waived [*sic*] documents in the air, pointed at witnesses and the prosecutor, spoke in an inappropriately loud voice on a number of occasions, sometimes forcing the Court to continue discussions in chambers, interrupted the Court in a discussion in chambers, pursued lines of questioning to which the Court had sustained objections, and inappropriately commented on the Court's evidentiary rulings. At the pretrial conference, the Court explained that "I don't want lawyers talking to each other certainly. I want the procedure to be dignified and not an exercise in combat." Pretrial Conference Transcript at 3.

Goldman attempts to rebut the specifications in the OSC by simple denial.[14] He suggested at the hearing that he never pointed or waived [*sic*] documents in the air. He explained that he never shouted, but that he merely speaks in a loud voice and has some hearing difficulties. Goldman also stated that he never intended to pursue lines of questions that the Court had barred through earlier rulings and that he did not comment on evidentiary rulings.

The Court personally observed that Goldman raised his voice to an unseemly level that bordered on shouting. Goldman never informed the Court during trial that he allegedly has a hearing problem, nor did he wear a visible hearing aid. Moreover, Goldman often spoke in a moderate

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[14] Eilender testified that he did not believe that Goldman engaged in the behavior outlined in the OSC. Again, the Court finds Eilender's characterization of the events inaccurate and relies on its own percipient observations as a basis for its conclusions.

tone which indicates that the hearing difficulty explanation is not credible.

The Court further finds that Goldman waived [*sic*] documents in the air, pointed at the Court and at the prosecutor and witnesses, interrupted the Court, pursued lines of questioning in areas that were ruled inadmissible in violation of instructions from the Court, and commented on evidentiary rulings. Despite Goldman's attempts to explain his reasons for his actions, or to convince the Court that the actions did not occur, the Court personally observed these actions, as more specifically described reflected in the OSC, and finds that Goldman acted willfully.

The Court provided a number of increasingly dire warnings to Goldman about this behavior, just as the Court did with respect to arguing objections in front of the jury as the Court outlined above. After the first instance of misconduct, the Court said "[y]ou are not to disregard my ruling." TT Vol. II, 56. Later in the proceedings, the Court told Goldman "[t]here are better ways to say things. I'm not making a judgment at this point, but that type of reaction just has no place in these proceedings. I don't know how I can persuade you that this isn't the way things should go." Vol. III, 18. Finally, after several more warnings about Goldman's courtroom conduct, the Court told Goldman in chambers "if you interrupt me one more time in that fashion, I will be compelled to do something I don't want to do. This is the last warning you have." Vol. IV, 30-31.

However, just like the Court's warnings with respect to objections, the Court continued to provide further warnings after that seemingly final statement. Later in the trial, the Court stated, "I implore you, don't disregard my instructions." Vol. IV[,] 44-45. After two more warnings, the Court commented that

> And let me tell you this now that I have finally reached my wit's end. I cannot manage this case.

> Your conduct is intolerable and I've resisted this for four or five days, but I am now telling you as a last resort because I cannot deal with this any longer, that if you persist any longer in violating my instructions and directions, I am going to cite you for contempt.
>
> And I've tried my best not getting to that point, the record will or will not reflect that, but you now have a clear warning.
>
> Let me make it even clearer for you: (1) you are not to argue objections; (2) as I said at the outset, you are to stand up, make an objection and give a legal ground and wait for a ruling; (3) You are not to wander around the courtroom, especially in the well of the courtroom; (4) you are not to shout and point fingers at me or anyone else; and (5) you are not to engage in discussions with the prosecutor or anyone else unless the Court gives you leave to do so. Those are very clear and unambiguous directions.

Vol. V, 187. In light of the plethora of warnings, and their increasing severity, it is impossible to conclude that Goldman did not intend to violate the Court's Orders.

D. Habit

As noted above, Goldman explained at the hearing that he never meant to disobey an Order of the Court, he merely acted out of habit. He claimed that his practice of arguing objections and walking in the well came from his history in New York courts which routinely allow such practices. As an initial matter, the Court does not accept that explanation due to the staggering number of clear warnings which the Court provided to Goldman. In addition, Goldman undermined his own position with his testimony at the hearing regarding his use of the "not binding" objection. HT at 30. After Goldman's fourth use of that objection, the Court informed him "[d]on't make this not binding

objection. That's not a legal objection." TT, Vol. 1 at 24. Goldman explained the meaning of the "not binding" objection at the hearing and stated that he has used the objection in his practice since his "formative years" as a lawyer. HT at 30-31. Goldman noted that he never made the objection again at trial after the instruction from the Court

> [b]ecause the Court was very specific in saying that it did not want it made and I did not make it. But I tell you Mr. Lewin, that particular objection I have always done *instinctively* for God knows how many years because it is a form of insurance objection.

HT at 32 (emphasis added). Goldman's explanation demonstrates that he did have the ability to control his "instinctive" habits. Goldman described the "not binding" objection as an "insurance" objection – basically a catch all like the now-discredited "irrelevant, incompetent, and immaterial." HT at 31. Goldman's ability to control one argumentative instinct belies his claim that he could not comply with other Orders of the Court.

While not necessary to its decision, the Court also notes its grave doubts about Goldman's characterization of the practices in New York courts. The Court finds it hard to believe that federal courts in New York allow lawyers to argue objections in front of the jury and wander around the courtroom. A brief examination of the Director of Federal Court Guidelines, vol. 1, Aspen Law & Business (1998) ("Directory"), paints a much different picture of practice in New York federal courts than the one provided by Goldman. The Court examined the reported preferences of judges for the Southern District and Eastern District of New York and will discuss some of the highlights. In sum, the information about the courts in New York suggests that the practices of this Court are fairly standard across the country.

Many judges provided information on their own rules regarding the behavior considered here.[15] Of the judges who responded, eighteen require lawyers to speak and question from the lectern,[16] three more prefer it,[17] and only eight do not.[18] Twenty judges require lawyers to ask to approach witnesses[19] versus six who do not.[20] Twenty out of twenty one judges instruct lawyers not to argue objections.[21] Of those twenty, thirteen instruct lawyers generally not to argue

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[15] For simplicity, the Court will list the names of the judges alphabetically by chief judge, active judges, and senior judges in the Southern District and then the Eastern District. The Court will then list citations to the page number in the Directory after each name, omitting the 2C which would precede each page number. For example, the Court would list Batts, 2C: 77. The Court also notes that the judges on the two district courts may have changed since the publication of the Directory, but finds that it nonetheless provides a snapshot of the members of the bench a short time ago.

[16] Judges: Batts, 77, Brieant, 81, Kaplan, 110, Scheindlin, 146, Schwartz, 148, Sotomayor, 161, Carter, 178, Conner, 182, Kram, 206, Ward, 233, Sifton, 240, Amon, 243, Hurley, 252, Johnson, 255, Korman, 260, Raggi, 261, Glasser, 276, and Nickerson, 283.

[17] Judges: Goettel, 191, Keenan, 198, and Spatt, 267.

[18] Judges: Griesa, 67, Wood, 172, Haight, 195, Knapp, 202, Leisure, 212, Sand, 223, Mishler, 279, and Weinstein, 286.

[19] Judges: Batts, 77, Kaplan, 110, Schwartz, 155, Carter, 178, Goettel, 191, Haight, 195, Keenan, 198, Knapp, 202, Kram, 206, Leisure, 212, Sand, 223, Ward, 233, Sifton, 240, Amon, 243, Hurley, 252, Johnson, 255, Korman, 260, Raggi, 263, Glasser, 276 and Nickerson, 283.

[20] Judges: Brieant, 81, Scheindlin, 146, Wood, 172, Conner, 182, Spatt, 267, and Weinstein, 286.

[21] Judges: Batt, 78, Brieant, 82, Parker, 131, Patterson, 133, Schwartz, 156, Sotomayor, 162, Wood, 173, Carter, 179, Conner, 182, Goettel, 192, Keenan, 199, Stanton, 227, Ward, 233, Sifton, 240, Amon, 243, Johnson, 255, Korman, 260, Raggi, 263, Spatt, 268, and Mishler, 279. Weinstein, 285, asks for specificity in objections.

objections,[22] five limit the objector to only *a word or the* number of the Federal Rule at issue (such as "speculation" or "403"),[23] and two explicitly instruct lawyers not to argue with the ruling.[24]

Of the six judges who discuss their preferences for addressing matters at sidebar, a recess, or the end of the day, four do not favor sidebars,[25] one does,[26] and one approves either method.[27] Four judges, the only ones to mention it, explicitly forbid lawyers from pacing or wandering around the courtroom.[28] Three other judges instruct lawyers to address the Court in a formal manner and not to direct comments to each other.[29]

The Court concedes that the Directory does not provide a complete picture of the practice in New York federal courts. Many judges did not respond to the survey and many more do not express a preference on the issues relevant to this proceeding.[30] In addition, some judges might not comment on certain aspects of courtroom protocol because they do not have a position against certain behavior. At the same time,

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[22] Judges: Batts, 78, Brieant, 82, Schwartz, 156, Carter, 179, Goettel, 192, Keenan, 199, Ward, 233, Amon, 243, Johnson, 255, Korman, 260, Raggi, 263, Spatt, 268, and Mishler, 279.

[23] Judges: Sotomayor, 162, Wood, 173, Conner[,] 182, Stanton, 227, and Sifton, 240,

[24] Judges: Parker, 131, and Patterson, 133.

[25] Judges: Parker, 131, Patterson, 133, Sotomayor, 162, and Carter, 178.

[26] Judge Mishler, 179.

[27] Judge Raggi, 263.

[28] Judges: Parker, 131, Patterson, 133, Haight, 195, and Stanton, 227.

[29] Judges: Batts, 77, Schwartz, 155, and Sotomayor, 161.

[30] The Directory listed sixty three judges in the two districts at the time of publication. Only thirty two of those provided information relevant for these purposes.

those judges might not comment because they find certain admonishments unnecessary because every lawyer would already know them. Whatever the final tally, the *reported* practice of federal judges in the Southern and Eastern District of New York flatly contradicts Goldman's account of the practices to which he is accustomed. The Court has already concluded that Goldman could control his actions even if he was accustomed to different procedures. This evidence suggests to the Court that those habits were not ingrained because many courts in New York utilize the same well-established rules that this Court employs. For all of these reasons, the Court discounts Goldman's assertion of habit as a defense to his actions at trial.

Goldman also argued as a general defense at the hearing that he had no reason to violate an Order of the Court and thus he must have acted inadvertently when he did so. The Court does not know why Goldman acted as he did although it is not inconceivable that he acted for some perceived strategic advantage. Nevertheless, the Court does not need to reach a conclusion on this issue. Goldman's repeated violations of the Orders of the Court after almost continuous warnings allows for no conclusion except that Goldman acted willfully and intentionally. Thus, the Court finds that Goldman repeatedly knowingly and willfully violated clear Orders of the Court.[31]

Finally, Goldman's violations of the Orders obstructed the administration of justice at the trial by requiring the Court to continually admonish Goldman, take unnecessary sidebars and recesses, interrupt the trial to explain protocol, and even send the jury out of the courtroom. *See, e.g.*, TT, Vol. III at 73-74 (sending jury out of the courtroom): Vol. IV

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[31] As discussed below, a conviction for criminal contempt does not require proof of an evil motive or an actual intent to obstruct justice and may be inferred from the facts and circumstances. *United States v. Thoreen*, 653 F.2d 1332, 1342 (9th Cir. 1981).

at 44-45 (sidebar): Vol. IV at 157 (sidebar); Vol. V at 105 (explaining protocol about well of courtroom). The Court explicitly announced its difficulty during the trial itself. Vol. V at 187 (commenting, while the jury was out, "I cannot manage this case").

III. FINDINGS OF FACT

Based on the above discussion, the Court FINDS, beyond a reasonable doubt, that contemnor, Robert E. Goldman:

Willfully, deliberately, and intentionally violated clearly expressed orders of the Court, in the presence of the Court, as outlined in the Order to Show Cause.

Specifically, Goldman argued objections after the Court gave a number of clear instructions not to do so at the pretrial conference and trial. Goldman failed to follow courtroom protocol by walking in the well of the courtroom on several occasions. Goldman also disregarded rulings of the Court by attempting to ask questions to which the Court had sustained objections; yelled in the courtroom; pointed his finger and gestured at the jury, a witness, and the prosecutor; and interrupted the Court.

The Court also FINDS, beyond a reasonable doubt, that Goldman's willful violations resulted in an obstruction of the administration of justice. Goldman's conduct wasted the time of the Court and the jury because it required the Court to continually admonish Goldman, take unnecessary sidebars and recesses, interrupt the trial to explain protocol and even send the jury out of the courtroom. Goldman's conduct also caused general disruptions due to his shouting, walking around the courtroom, pointing, and addressing remarks to the prosecutor.

IV. CONCLUSIONS OF LAW

The Federal Rules of Criminal Procedure provide for two distinct procedures by which to hold an individual in

criminal contempt: summary disposition[32] and disposition upon notice and hearing. *See* Fed. R. Crim. P. 42. The Court proceeded under the latter. Rule 42(b), which governs contempt upon notice and hearing, provides in pertinent part:

> A criminal contempt except [summary disposition] shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent.

18 U.S.C. § 401 grants courts the power to hold any person in criminal contempt. That section provides, in part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –

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[32] As the Court discusses at length below, a court may only proceed by summary contempt when the contemnor's actions threaten the administration of justice. As noted below, while the Court believes that it had ample justification to proceed on a summary basis in this case, it opted to proceed by means of a noticed hearing to provide Goldman with a full opportunity to respond.

> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> . . .
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Contempt must be proven beyond a reasonable doubt. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992). The criminal contempt power exists to punish disobedience to judicial orders and to ensure that the judiciary has a means to vindicate its own authority. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987).

A conviction for criminal contempt under section 401(1) requires proof beyond a reasonable doubt of willful misbehavior in the presence of the Court which obstructs the administration of justice. *United States v. Thoreen*, 653 F.2d 1332, 1339 (9th Cir. 1981). Disobeying a court's order, rulings, or instructions amounts to misbehavior. *Id.* at 1339-40; *In re Gustafason*, 650 F.2d 1017, 1020 (9th Cir. 1981) (en banc). Obstruction of justice may arise from a disruption and delay in the proceedings. *Id.* at 1340-41. *See also United States v. McGainey*, 37 F.3d 682, 685 (D.C. Cir. 1994) (finding "delay, confusion, and the diversion of judicial resources" as a result of diverting Marshals from their posts, interrupting the judge twice, and sending the jury out for ten minutes, constituted and obstruction of justice).

A conviction for criminal contempt under section 401(3) requires proof beyond a reasonable doubt of a willful violation of a clear and definite order of which the contemnor knew. *United States v. Doe*, 125 F.3d 1249, 1254 (9th Cir. 1997); *Thoreen*, 653 F.2d at 1339; *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 195 (9th Cir. 1979).

Goldman's behavior supports a conviction under both subsection one and subsection three of section 401. As discussed at length above, the Court issued a significant number of clear and definite orders to Goldman about his conduct at trial. Goldman willfully and intentionally violated those clear orders. That finding establishes a violation of subsection three. In addition, also noted above, Goldman's failure to follow the orders of the Court obstructed the administration of justice at the trial by requiring the Court to: continually admonish Goldman, take unnecessary sidebars and recesses, interrupt the trial to explain and reexplain the Court's procedures, and send the jury out of the courtroom. That finding supports a conviction under subsection one.

Other courts have supported a judgment of criminal contempt with less pervasive records of misconduct and disobedience. In *In re Levine,* the D.C. Circuit affirmed a summary criminal contempt conviction pursuant to section 401(3). 27 F.3d 594, 595-96 (D.C. Cir. 1994). Levine attempted to introduce a document that the district court had ruled inadmissible, ignored objections, and argued a ruling in a loud, argumentative tone before the jury. The *Levine* court commented that the district court had issued a clear order because the court repeated it to Levine and warned him of the threat of contempt. *Id.* In *In re Ellenbogen*, the D.C. Circuit again affirmed a summary contempt[33] conviction under section 401(3). 72 F.3d 153, 157-58 (D.C. Cir 1995). In *Ellenbogen*, the trial court had granted a motion in limine which sought to prohibit any comment on the fact that a certain individual had been acquitted. When Ellenbogen asked about the acquittal anyway the court entered a finding of summary contempt. The D.C. Circuit pointed out that the

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[33] As detailed above, the Court gave a series of escalating warnings to Goldman – which provided far better notice than that approved in *Levine*.

district court had warned Ellenbogen about his conduct in general, although not specifically about mentioning the acquittal. The D.C. Circuit noted that "the fact that the court warned Ellenbogen about his courtroom conduct in general makes the record stronger that it needs to be." *Id.*

In *United States v. Thoreen*, the Ninth Circuit affirmed a contempt conviction, under both section 401(1) and 401(3), of a lawyer who purposefully substituted an individual for the defendant at counsel table to hinder eyewitness identification of the defendant. 653 F.2d 1332 (9th Cir. 1981). The Ninth Circuit found that this practice violated the district court's order that excluded witnesses from the courtroom because defense counsel planned to call the substituted individual for violation of a trial procedure order of the court.

Goldman argues that he did not violate 18 U.S.C. § 401. With respect to subsection one, Goldman makes two arguments. First, he contends that he never violated an instruction or Order of the Court. The Court considered that position in the factual discussion above and finds beyond a reasonable doubt that Goldman deliberately and willfully engaged in the violations as specified in the OSC.

Second, Goldman argues that he did not obstruct the administration of justice and that courts should resolve all doubts in favor of vigorous advocacy. The Court also discussed this contention above. The Court acknowledges that lawyers, especially those defending the accused, must have significant latitude to protect their clients. Nevertheless, the Court finds that Goldman's willful violations of Court Orders crossed the line of vigorous advocacy and amounted to contumacy. His failure to follow the Court's directives led to substantial interruptions in the trial. As the D.C. Circuit observed in *Ellenbogen*, "[z]ealous advocacy of a client's cause is never a legitimate excuse for disobeying a clear ruling of the court, and convicting a

lawyer of contempt for actual disobedience will not chill criminal defense attorneys from zealous advocacy within the bounds of the law." 72 F.3d at 157-58.

Goldman added a number of arguments in a supplemental brief filed on February 16, 1999 in response to the Court's January 29, 1999 Order. The Court finds that Goldman had adequate notice of the nature of the Court's inquiry before the evidentiary hearing because the Court specified every instance of contumacious behavior, with citations to the record, in the appendices to its Order to Show Cause. In addition, as the Court noted in its Order allowing the supplemental brief, subsection one subsumes subsection three in this case because the violation of Court Orders also constituted misbehavior in the presence of the Court for purposes of subsection one.

Thus, the application of the subsections only differ on these facts because subsection three does not require proof of an obstruction of justice. In other words, on these facts, subsection one required proof of two elements – both of which were part of the proof for a violation of subsection one. Accordingly, because Goldman already presented arguments that the Court did not ever issue a clear Order, that he did not willfully violate an Order, and that his actions did not obstruct justice, the Court felt that Goldman had already offered a full defense. Nevertheless, out of an abundance of caution, the Court afforded Goldman an opportunity to add any arguments he felt relevant after the Court provided explicit notice of its intention to proceed under subsection three.

Goldman's supplemental response contains three basic arguments against the application of section 401(3). First, Goldman contends that section 401(3) does not apply to violations of orders issued during a trial, especially those governing the courtroom behavior of a lawyer. Second, he suggests that even under section 401(3) a conviction of

contempt based on violations of orders at trial requires a finding of obstruction of justice. Third, he claims that convicting him under subsection three would violate Due Process because "he was not charged under that statute." Supplemental Brief at 10.

Section 401(3) Applies to Oral Orders Issued During a Trial, Including Orders Governing Courtroom Behavior of a Lawyer

Goldman asserts that section 401(3) "covers *only* violations of formal written orders entered by a court during or at the conclusion of litigation." Supplemental Brief at 3 (emphasis in original). At least five circuits, including the Ninth Circuit, have concluded otherwise. *See United States v. Mottweiler*, 82 F.3d 769 (7th Cir. 1996); *In re Ellenbogen*, 72 F.3d 153 (D.C. Cir. 1995); *United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995); *In re Levine*, 27 F.3d 594 (D.C. Cir. 1994); *In re West*, 21 F.3d 607 (5th Cir. 1994); *In re Holloway*, 995 F.2d 1080 (D.C. Cir. 1993); *United States v. Baldwin*, 770 F.2d 1550 (11th Cir. 1985); *United States v. Lowery*, 733 F.2d 441 (7th Cir. 1984); *In re Grand Jury Proceedings*, 708 F.2d 1455 (9th Cir. 1983); *Chapman v. Pacific Telephone & Telegraph*, 613 F.2d 193 (9th Cir. 1979); *In re Niblack*, 476 F.2d 930 (D.C. Cir. 1973); *United States v. Bukowski*, 435 F.2d 1094 (7th Cir. 1970).

Goldman then narrows his argument to suggest that section 401(3) does not apply to oral orders to lawyers regarding courtroom behavior. He points out that the Ninth Circuit has never decided a case in that factual setting, and concludes from that absence of authority that the Ninth Circuit would not apply subsection three in this setting. Goldman argues that the Ninth Circuit's failure to discuss subsection three in *In re Gustafson*, 650 F.2d 1017 (9th Cir. 1981) (en banc), supports this view.[34] This argument fails

[34] *Gustafson* does not advance Goldman's argument. In *Gustafson*, a judge had proceeded by means of summary contempt and found a lawyer

for two reasons. First, the Ninth Circuit has upheld a contempt conviction in similar circumstances. *In re Osbourne*, 344 F.2d 611, 615 (9th Cir. 1965) (affirming contempt conviction, without specifying the statutory basis, of a criminal defense lawyer for his efforts to "disregard[] the orders and directions of the Court" by attempting to delay a trial by making objections and asking for continuances during the trial itself). Second, even if the Ninth Circuit has never been presented with this issue, the Ninth Circuit has never so much as suggested that section 401(3) would not apply. Those circuits which *have* faced the issue unanimously agree that it does. Several of the cases cited above upheld contempt convictions under section 401(3) for violations of oral orders to trial counsel. *See In re Ellenbogen*, 72 F.3d at 157-58 (improper objections and questioning); *In re Levine*, 27 F.3d at 595-96 (same); *In re Holloway*, 995 F.2d at 1082-84 (asking prohibited questions); *Lowery*, 733 F.2d at 445-46 (improper questioning). One other reversed the conviction on the facts

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guilty based upon the lawyer's failure to follow instructions regarding the speed and content of his argument. 650 F.2d at 1019-20. The Ninth Circuit quoted the provisions of section 401 and then stated that because the contemnor was not an "officer" of the court, only subsection one "is at issue here." *Id.* the Ninth Circuit did not explain why it did not find that subsection three also applied – the opinion provides no mention of that subsection aside from its citation to the statute. Accordingly, *Gustafson* cannot be read as support for the idea that subsection three does not apply in this case – it did not provide any legal conclusion, and even if it had, that conclusion would be dicta. It could easily be argued that the Ninth Circuit did not reach the application of subsection three in *Gustafson* because subsection one applied anyway and, as discussed below, the fact that the district court had proceeded in summary fashion independently required the court to find an obstruction of justice. The Court need not reach a conclusion on that issue. The Court simply notes that *Gustafson* does not extend as far as Goldman contends and other cases decided by the Ninth Circuit and other Courts of Appeals squarely contradict Goldman's conclusion.

but clearly approved the theory of an oral order as a basis for contempt. *In re West*, 21 F.3d at 608-09 (exceeding the scope of direct examination).

Goldman also suggests that reading subsection three to apply to this situation renders subsection one superfluous. This argument misunderstands the interplay between the provisions of the contempt statute. A violation of subsection one of the statute requires misbehavior in the presence of the Court which actually obstructs the administration of justice. Violation of an order of a court amounts to misbehavior. *United States v. Thoreen*, 653 F.2d at 1339-40; *United States v. Gustafson*, 650 F.2d at 1020. A violation of subsection three requires disobedience to a "lawful writ, process, order, rule, decree, or command," but does not require the obstruction of justice. These provisions aim at separate, but sometimes overlapping, conduct. Subsection one governs behavior which occurs in the presence of a court; subsection three applies to the violation of an order which occurs within or outside the presence of a court. Violating an order in a court's presence meets the statutory requirements of both subsections (assuming the violation obstructs the administration of justice), but that conclusion does not render subsection one superfluous. One can misbehave in the presence of a court without violating an order just as one can violate an order outside the presence of a court. While the Court suggested that "subsection one subsumes subsection three in this case," it does not imply that subsection one always subsumes subsection three, thus rendering it a nullity.[35]

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[35] Goldman's reading conflicts with the text and rationale of the statute. As discussed, below, he would have the Court read 18 U.S.C. § 401(3) to suggest that only a written order of a court, and not an oral order, constitutes an "order," or that only some orders, not those regarding trial practice and procedure, qualify as "orders." The Court's reading comports with the traditional understanding of the contempt power: that individuals must follow all orders of a court.

As discussed above, case law supports this result. A number of courts have held that violation by trial counsel of oral orders issued during the trial amounts to contempt under subsection three. Goldman's reading of the statute ignores its plain meaning and the holdings of these cases.[36]

Section 401(3) Does Not Require That a Lawyer's Courtroom Behavior Obstruct Justice

Goldman claims that the conduct of a lawyer in a courtroom does not violate section 401(3) unless that conduct obstructs the administration of justice. In other words, Goldman suggests that section 401(3) implicitly contains the obstruction of justice requirement of section 401(1), at least with respect to trial lawyers. This misstates the law and stems from a misunderstanding of Federal Rule of Criminal Procedure 42 which governs the application of contempt.

As discussed above, section 401(3) does not contain a requirement that the violation of an order of a court also obstruct justice. The plain language of the statute shows that Congress required obstruction for violations of subsection one but not subsection three.[37] In addition, a number of

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[36] Goldman also offers a lengthy discussion of the meaning of the words writ, process, decree, and order to suggest that section 401(3) does not apply to oral orders of a court. As discussed above, however, courts have not accepted that argument in cases which directly raise the issue. For example, Goldman explains that "[t]he D.C. Circuit has used this principle to interpret the word 'rule' in § 401(3) to *exclude* a 'general, standing rule of court.'" Supplemental Brief at 7 (quoting *In re Brown*, 454 F.2d 99, 1006 n.33 (D.C. Cir. 1971)) (emphasis in original). Yet Goldman fails to cite the more recent, directly apposite authority from the D.C. Circuit which holds that violation of oral orders by trial lawyers amounts to contempt under section 401(3). *See In re Ellenbogen*, 72 F.3d 153 (D.C. Cir. 1995); *In re Levine*, 27 F.3d 594 (D.C. Cir. 1994).

[37] Congress could not have spoken more clearly. The inclusion of the obstruction of justice element in subsection one demonstrates that Congress decided not to include it in subsection three.

cases from the Courts of Appeals have explicitly rejected Goldman's argument. *See United States v. Griffin*, 84 F.3d 820, 832 (7th Cir. 1996) (finding the "crucial difference between subsections (1) and (3) for our purposes in the objective result requirement regarding obstruction of justice in subsection (1) and the lack of such a requirement in subsection (3)") *Taberer v. Armstrong World Industries, Inc.*, 954 F.2d 888, 897-901 (3d Cir. 1992) (Becker, J.) (holding that history, case law, and statutory authority indicate that obstruction of justice requirement does not extend to subsection three); *United States v. Martin*, 525 F.2d 703, 708-10 (2d Cir. 1975) (finding that subsection three does not require proof of obstruction of justice). A number of other decisions of the Courts of Appeals implicitly reach the same conclusion by considering contempt convictions under section 401(3) without finding, or even discussing, obstruction of justice. *See Yagman v. Republic Ins.*, 987 F.2d 622 (9th Cir. 1993); *U.S. v. Rose*, 806 F.2d 931 (9th Cir. 1986); *Clemente v. United States*, 766 F.2d 1358 (9th Cir. 1985); *United States v. Powers*, 629 F.2d 619 (9th Cir. 1980); *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193 (9th Cir. 1979); *United States v. Themy-Kotronakis*, 140 F.3d 274 (4th Cir. 1998); *United States v. Linney*, 134 F.3d 274 (4th Cir. 1998); *United States v. Young*, 107 F.3d 903 (D.C. Cir. 1997); *United States v. Mottweiler*, 82 F.3d 769 (7th Cir. 1996); *Wright v. Nichols*, 80 F.3d 1248 (8th Cir. 1996); *United States v. Allen*, 73 F.3d 64 (6th Cir. 1995); *In re Ellenbogen*, 72 F.3d 153 (D.C. Cir. 1995); *Doe v. Maywood Housing Authority*, 71 F.3d 1294 (7th Cir. 1995); *Huber v. Marine Midland Bank*, 51 F.3d 5 (2d Cir. 1995); *Downey v. Clauder*, 30 F.3d 681 (6th Cir. 1994); *In re Levine*, 27 F.3d 594 (D.C. Cir. 1994); *Hazen v. Reagen*, 16 F.3d 921 (8th Cir. 1994); *United States v. Nynex Corp.*, 8 F.3d 52 (D.C. Cir. 1993); *United States v. Allocco*, 994 F.2d 82 (2d Cir. 1993); *Cooper v. Texaco*, 961 F.2d 71 (5th Cir. 1992); *United States v. Maynard*, 933 F.2d 918 (11th Cir. 1991); *United States v. KS&W Offshore Engineering Inc.*,

932 F.2d 906 (11th Cir. 1991); *United States v. Kozel*, 908 F.2d 205 (7th Cir. 1990); *United States v. Burstyn*, 878 F.2d 1322 (11th Cir. 1989); *United States v. Revie*, 834 F.2d 1198 (5th Cir. 1987); *In re MacDonald*, 819 F.2d 1020 (11th Cir. 1987); *Vaughn v. City of Flint*, 752 F.2d 1160 (6th Cir. 1985).

Nevertheless, Goldman urges this Court to introduce the obstruction requirement into subsection three by judicial fiat. Goldman cites several cases which discuss obstruction of justice in the context of a conviction for section 401(3). Those cases are inapposite because they all deal with summary contempt proceedings. Those cases discuss obstruction not because it is required under section 401(3), but because summary contempts independently require proof of an obstruction of justice. Accordingly, those cases do not suggest that convicting a lawyer under subsection three requires proof of an obstruction of justice. *See United States v. Wilson*, 421 U.S. 309, 318-19 (1975) (discussing the limitation of summary contempt to cases in which contumacious action disrupts an ongoing proceeding or frustrates the authority of the court); *Bloom v. Illinois*, 391 U.S. 194, 202-04 (1968) (explaining dangers of summary contempt and noting Congress' desire to limit the potential for abuse of such proceedings); *Harris v. United States*, 382 U.S. 162, 167 (1965) (stating that courts must limit summary contempt procedures to situations in which "instant action is necessary to protect the judicial institution itself" because summary procedures depart from traditional due process standards); *Taberer*, 954 F.2d at 898 (noting Congress added the obstruction requirement to curb the summary contempt power).

Goldman's supplemental brief ignores this distinction and suggests that "the courts have unvaryingly warned that criminal contempt should be invoked against courtroom trial layers only where their conduct actually obstructs justice." Supplemental Brief at 8. Goldman cites two cases for his

argument, *In re Greenberg*, 849 F.2d 1251, 1255 (9th Cir. 1988), and *Hawk v. Cardoza*, 575 F.2d 732, 735 (9th Cir. 1978). Both of those cases involved convictions after a summary contempt proceeding. *In re Greenberg* could not have made this point more clearly: "a district court should not *summarily* convict an attorney of criminal contempt unless that attorney 'create[s] an obstruction which blocks the judge in the performance of his judicial duty.'" *Id.*, at 1255 (quoting *In re McConnell*, 370 U.S. 230, 236 (1962)) (emphasis added). Later in the same section of his brief, Goldman cites three other cases. Two of those cases, *In re McConnell*, 370 U.S. at 236, and *Weiss v. Burr*, 484 F.2d 973, 980 (9th Cir. 1973), also involved summary contempt convictions. The third case, *United States v. Thoreen*, 653 F.2d 1332, 1340 (9th Cir. 1981), involved a conviction at a show cause hearing. However, the section of the opinion which Goldman quotes outlined the requirement of an obstruction of justice for a conviction under subsection one. The *Thoreen* opinion makes this point clear by citing two other cases, *In re Kirk*, 641 F.2d 684, 687 (9th Cir. 1981), and *United States v. Searle*, 461 F.2d 345, 369 (7th Cir. 1972), which both discuss the elements of subsection one, not subsection three. Judge Becker's opinion in *Taberer* specifically rejects *Thoreen* and *Kirk* as support for a claim "that there can be no conviction for criminal contempt absent a showing of obstruction." 954 F.2d at 900 n.15.

A court must find that the contumacious conduct threatens the orderly administration of justice before it decides to employ a summary contempt proceeding. The Constitution requires such a finding because of the departures from traditional process inherent in a summary proceeding. The Supreme Court reaffirmed this rule in its most recent decision on the subject of contempt: "While the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order, the states must have latitude in determining what conduct so infects orderly

judicial proceedings that contempt is permitted." *Pounders v. Watson*, 117 S. Ct. 2359, 2363 (1997). Although the Court believes that it could have done so, the Court did not proceed by summary contempt in this case. Instead, Goldman had a hearing pursuant to Federal Rule of Criminal Procedure 42(b) and offered a lengthy defense. Accordingly, a conviction of Goldman under section three does not require proof of an obstruction of justice.[38]

Goldman's Conviction Under Section 401(3) Does Not Violate Due Process

As noted above, Goldman argues that convicting him under 18 U.S.C. § 401(3) would violate Due Process because the Court's Order to Show Cause listed only subsection one in the relevant footnote. For the sake of clarity, the Court now briefly recapitulates the relevant facts which it outlined more fully above. After the trial, the Court issued an Order to Show Cause which announced the Court's intention to proceed by means of criminal contempt and outlined every instance of conduct, with citations to the reporter's transcript. The Order to Show Cause provided a brief legal discussion which cited Federal Rule of Criminal Procedure 42(b) and 18 U.S.C. § 401. The Court then gave Goldman a significant amount of time, including continuances, to prepare a defense. After the hearing, at which the Court announced Goldman's conviction of criminal contempt and sentence, the Court realized that the Order to Show Cause only specifically listed, in a footnote, subsection one of section 401. Accordingly, the Court allowed Goldman a supplemental brief to address the application of subsection three – despite the fact that the detailed factual allegations in the OSC clearly applied to both subsections one and three and Goldman already offered a complete defense.

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[38] Of course, the Court also found that Goldman's conduct obstructed justice for the reasons outlined above.

Goldman's supplemental brief cites a number of cases which stand for the well-established proposition that an accused may not be convicted of an offense for which he or she was not charged. However, Goldman's supplemental brief does not cite any authority which discusses the requirements of notice in criminal contempt proceedings. The Court will outline those principles below.

Federal Rule of Criminal Procedure 42(b) states that criminal contempts other than summary contempts under section 42(a) "shall be prosecuted on notice . . . [which] shall *state the essential facts* constituting the criminal contempt charged and describe it as such." Fed. R. Crim. P. 42(b) (emphasis added). "The notice required by Rule 42(b) is not an indictment or information. Rather a Rule 42(b) notice must simply satisfy due process requirements by 'contain[ing] enough to inform [the alleged contemnor] of the nature and particulars of the contempt charged.'" *United States v. Linney*, 134 F.3d 274, 279 (4th Cir. 1988) (citations omitted) (quoting *United States v. Robinson*, 449 F.2d 925, 930 (9th Cir. 1971)).

In the Ninth Circuit, Rule 42(b) requires that a contemnor receive notice of the existence of a contempt charge and its factual basis. The notice need not list specific counts, as in a formal indictment. [39] *United States v.*

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[39] In fact, even under the more stringent standards for notice which apply to a formal indictment, minor or technical mistakes in the citation of statutory authority do not amount to reversible error. *United States v.* Normandeau, 800 F.2d 953, 958 (9th Cir. 1986). *See also Smith v. United States*, 360 U.S. 1, 9 (1959) (explaining that "minor and technical deficiencies [in the charging papers] which did not prejudice the accused" do not require reversal). In *Echavarria-Olarte v. Reno*, 35 F.3d 395, 398-99 (9th Cir. 1994), the Ninth Circuit held that an indictment's failure to cite the subsections contained the substantive criminal offenses, did not amount to error as long as the cited statutory section and the indictment, read together, specifically described each element of the charged substantive offenses. In other words, Goldman argues that the notice requirement regarding the citation of statutory authority mandated

Rylander, 714 F.2d 996, 1004 (9th Cir. 1983); *Robinson*, 449 F.2d 925, 930 (9th Cir. 1971). The notice also does not need to provide a citation to the statutory authority for the charge, especially where knowledge of the relevant facts and the contempt hearing allow the preparation of an adequate defense. *United States v. Lee*, 720 F.2d 1049, 1053 (9th Cir. 1983); *Rylander*, 714 F.2d at 1004; *In re Allis*, 531 F.2d 1391, 1392-93 (9th Cir. 1976). *But compare United States v. Powers*, 629 F.2d 619, 629 (9th Cir. 1980) (urging, although explicitly not requiring, district courts to identify the proceeding as criminal and cite the relevant statutory authority). Other circuits agree. *United States v. Linney*, 134 F.3d 274, 279 (4th Cir. 1998); *United States v. Griffin*, 84 F.3d 820, 827 (7th Cir. 1996); *American Airlines v. Allied Pilots Assoc.*, 968 F.2d 523, 530 (5th Cir. 1992). Thus, in this case, the Court provided significantly more notice than the Ninth Circuit has required in any case: the Court presented Goldman with an exhaustive list of alleged contumacious behavior and cited Rule 42(b) and section 401. The fact that the Court inadvertently omitted the recitation, in a footnote, of subsection three to the section upon which it relied does not undermine the validity of the notice of Goldman.

In addition, a failure to provide the correct notice does not necessarily invalidate a conviction. As the Ninth Circuit explained in *Powers*: "When it is entirely impossible to determine the character of the contempt proceedings, the contempt judgment may be invalid. The judgment may not be invalid, however, if the contemnor should have realized what form of contempt proceeding was contemplated and if adequate notice was given." 629 F.2d at 628 (citations

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by Rule 42(b) is not only more rigorous than the established standard in the Ninth Circuit for such proceedings, but the Ninth Circuit's notice requirement for formal criminal indictments under Federal Rule of Criminal Procedure 7(c) as well.

omitted).[40] In *Powers*, the district court judge continuously described the nature of the contempt as civil. Upon realizing his error, he told the contemnor, just before the hearing, that the court had meant criminal contempt. The Ninth Circuit affirmed the subsequent conviction, stating "[a]lthough the district court improperly called the contempt civil, 'Nichols' attorney was clearly apprised of the nature of the charges against his client. Nichols' attorney objected to the last-minute change in the name of the proceedings. Nevertheless, the attorney presented a defense consistent with a criminal contempt charge." *Id.* The Ninth Circuit also found that the court had held the contemnor without bail, even though Rule 42(b) required bail in that case, but concluded that the contemnor did not face prejudice from either of the court's mistakes because "the notice of the charge against him was adequate [and h]e was afforded an adequate opportunity to prepare a defense." *Id.* at 629. Thus in *Powers* the Ninth Circuit affirmed the conviction of a contemnor after the district court had made an affirmative misrepresentation of the relevant law, not merely an inadvertent omission.

In the instant case, even if Goldman did not receive adequate notice because of the Court's failure to list subsection three in the OSC, Goldman clearly did not suffer prejudice. Goldman received thorough notice of the facts underlying the contempt charge and knew that section 401 applied.[41] Goldman now asserts that the failure to cite

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[40] Other courts agree and find notice defects harmless in the absence of prejudice to the contemnor. See *United States v. United Mine Workers of America*, 330 U.S. 248, 297-98 (1947); *United States v. Griffin*, 84 F.3d at 832 n.10; *In re Grand Jury Proceedings*, 875 F.2d 927, 932 n.4 (1st Cir. 1989).

[41] Goldman's supplemental brief contains the disingenuous comment that the Court's supplemental Order stated that "Goldman had adequate notice that he violated both sections" – which Goldman claims suggests that the Court prejudged the case. The Court did not do so; the Court made the comment in the supplemental Order after it had adjudged

subsection three led to a misallocation of resources at the hearing. The record clearly refutes that claim. The Court allowed Goldman as much time as he desired to present evidence and argument. *See, e.g.*, HT at 7 ("I want to give you an opportunity to make your presentation as completely as you wish"); *Id.* at 79 ("Not in any way intending to place any restriction on your presentation, just by way of an estimate, when we resume at about 1:45 or so, how much longer do you thing you will be between Goldman and Eilender? . . . I mean if you need more, that's okay too."). Goldman's initial brief and his argument at the hearing focused on three contentions: (1) Goldman did not violate the Court's instructions; (2) if he did, he did not do so willfully or deliberately; and (3) Goldman's conduct did not obstruct justice. Goldman's defense thus focused on all three elements of subsection one. However, Goldman's defense necessarily also addressed both elements of subsection three, because in this case, the application of the two subsections only differ based on whether or not they require an obstruction of justice.[42] In other words, the misbehavior for subsection one relies on the violation of Court Orders, which also supports a conviction under subsection three.

Goldman already attacked the clarity of the Court's Orders at the trial because such defense would shield Goldman from conviction under either subsection.

Goldman guilty. At that time, Goldman had been found to have violated section 401.

[42] Independently, Federal Rule of Criminal Procedure 31(c) allows the conviction of an individual based on a lesser included offense to the crime charged, even if prosecuted by an indictment which does not mention the lesser included offense. Goldman's brief cites cases which refuse to allow the conviction for an offense that did not truly fall within the charged offense. In this case, however, proof of a violation of subsection one necessarily proves a violation of subsection three.

Accordingly, even if Goldman did not receive notice, which he clearly did, he still had an ample opportunity to provide, and in fact provided, a complete defense. In addition, the Court's supplemental Order offered Goldman another opportunity to provide any defenses he felt he had not raised. Goldman's supplemental brief then raised additional issues which the Court considered above.

The Ninth Circuit has consistently held that a contemnor who knows of the contempt charge and the specific facts upon which that charge relies has received ample notice. Goldman received significantly more than that from this Court. The Order to Show Cause clearly and specifically stated the nature of the charge brought against him (criminal contempt), the statutory authority for the charge (18 U.S.C. § 401), every instance of his conduct which gave rise to the contempt charge, and informed him of the 42(b) proceeding. To suggest that Goldman and his able counsel could not determine that both subsection one and subsection three of section 401 applied to Goldman's situation is simply not credible. However, even if Goldman did fail to appreciate the applicability of both subsections, the applicable law regarding notice in contempt proceedings does not contemplate the extraordinary detail Goldman seeks.

The Court has provided Goldman every opportunity to provide a full and complete defense is this matter. The Court observed Goldman's conduct at the trial; nevertheless, the Court did not proceed by means of summary contempt, but instead presented Goldman significant notice and a hearing before reaching a conclusion. Goldman feels that the Court has engaged in an "extraordinary effort to shore up Goldman's conviction" in a way that "reflects an emotional involvement in the case that is inconsistent with the Court's constitutional role as an impartial arbiter." Supplemental Brief at 14. The Court regrets those comments from Goldman because it feels it has proceeded in a deliberate and thorough manner to express its conclusions of fact and law

while providing Goldman every opportunity to be heard. The Court has attempted to prepare a careful Order in this matter, as it announced it would at the end of the hearing. In the final analysis, Goldman's behavior flouted the authority of the Court and hindered the Court's attempts to maintain control of a criminal trial. Accordingly, the Court finds that Goldman's regrettable conduct fell within the heart of the contempt power and amply supports his conviction under subsection one and subsection three of 18 U.S.C. § 401.

IT IS SO ORDERED.

DATED: May 13, 1999

/s/_____
STEPHEN V. WILSON
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MILES GALIN, Defendant.	) CR 96-885(a) SVW)) ORDER ALLOWING) SUPPLEMENTAL) BRIEFING))
ROBERT E. GOLDMAN, Contemnor	)

The Court's Order to Show Cause in this matter, dated July 15, 1998, informed Mr. Goldman that the Court considered his actions at the trial of Miles Galin to constitute criminal contempt pursuant to 18 U.S.C. § 401. The Order to Show Cause, which specifically outlined each violation of a Court order by Mr. Goldman, referred only to subsection one of section 401 and not subsection three. 18 U.S.C. § 401 provides, in full, that

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

At the October 29, 1998, hearing, the Court found Mr. Goldman guilty of violating 18 U.S.C. § 401(1) and announced its intention to issue a written order. The Court is also considering making findings with respect to 18 U.S.C. § 401(3), but notes that the Order to Show Cause only put Mr. Goldman on explicit notice of the Court's use of subsection one. The Court believes that Mr. Goldman had adequate notice that he violated both sections. The Order to Show Cause focused on Mr. Goldman's willful violation of Court Orders and the hearing dealt primarily with the same topic.

In addition, as a practical matter, subsection one subsumes subsection three in this case. Criminal contempt pursuant to subsection one requires proof of four elements beyond a reasonable doubt: "(1) misbehavior, (2) in or near the presence of the court, (3) with criminal intent, (4) that resulted in an obstruction of the administration of justice." *American Airlines, Inc. v. Allied Pilots Ass'n*, 968 F.2d 523, 531 (5th Cir. 1992). Criminal contempt under subsection three, however, only requires proof beyond a reasonable doubt that the contemnor knew of a clear and definite order of the court and that he willfully disobeyed it. *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 195 (9th Cir. 1979). *See also Taberer v. Armstrong World Indus.*, 954 F.2d 888, 897 (3d Cir. 1992) (Becker, J.) (observing that, unlike section 401(1), section 401(3) does not require proof of obstruction of justice). For this reason, Mr. Goldman already presented his arguments in defense of both sections of the statute, because he argued that he did not willfully violate a Court Order as part of his response to subsection one. Nevertheless, to the extent that Mr. Goldman wishes to address subsection three specifically, the Court will allow him a supplemental brief on that issue.

Accordingly, the Court GRANTS Mr. Goldman until February 16, 1999, to submit such a brief if he so desires.

IT IS SO ORDERED.

DATED: 1/28/99

/s/_____
STEPHEN V. WILSON
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	) NO. CR 96-885(a)) SVW
v.	)
MILES GALIN, Defendants [*sic*].	) MEMORANDUM) AND ORDER

This matter comes before the court on Judge Stephen V. Wilson's order referring respondent's request to disqualify judge [*sic*] in a criminal case. The court has fully considered Judge Wilson's Order to Show Cause and Robert E. Goldman's response thereto as they pertain to the recusal issue. This matter is appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7.11. We rule as follows:

A criminal contempt may be prosecuted upon notice and hearing, but if the contempt charged involves "disrespect to or criticism of" a judge, that judge is disqualified from presiding at a hearing. Fed. R. Crim. P. 42(b). This requirement of disqualification seeks to avoid a likelihood of bias or appearance of bias to the point that the judge is unable to perform the judicial function. *See Ungar v. Sarafite*, 376 U.S. 575, 588 (1964); *United States v. Griffin*, 84 F.3d 820, 830 (7th Cir. 1996).

Our attention is directed to two specific remarks by respondent. First, during an in-chambers conference on June 19, 1998, respondent said:

> I would like the record to reflect I believe that yesterday today and the day before, the Court's approach to never permitting me to finish a thought

> before engaging in its own momentum only demonstrates a bias which I think at this point, Your Honor, is beginning to show the manner in which it is not a fair trial.

Order to Show Cause Re: Criminal Contempt of Robert E. Goldman, 8 n.9. Second, after Judge Wilson admonished respondent for again arguing an objection in front of the jury, respondent said, "Your Honor, may we have the criticism once directed in [that] direction." *Id.* (alteration in original).

In evaluating whether specific remarks or conduct rise to the level of disrespect and criticism that requires disqualification, the court applies an objective standard: Do the circumstances "raise reasonable questions about [the judge's] impartiality, regardless of his state of mind or ability to conduct a fair and impartial hearing"? *Griffin*, 84 F.3d at 830.

The court does not look to specific remarks or behavior that, in isolation, could be construed as disrespectful or critical of the judge, but rather to whether the overall pattern reasonably could be seen to undermine the judge's impartiality. Thus, the court is unwilling to pluck from other cases in which disqualification was deemed appropriate allegedly comparable remarks to those respondent made to Judge Wilson and, on that basis, characterize respondent's remarks as disrespectful or critical to the point of requiring that the judge recuse himself from the contempt hearing. *See, e.g.*, *In re Dellinger*, 461 F.2d 389, 396 (7th Cir. 1972); *United States v. Meyer*, 462 F.2d 827, 829-30 (D.C. Cir. 1972).

In citing examples of purportedly comparable remarks to those respondent made to Judge Wilson from cases in which disqualification was required, respondent fails to list the additional egregious behavior that, in combination with the cited remarks, amounted to disrespect or criticism. For example, although Mr. Goldman points out that the

respondent in *In re Dellinger* said to the judge, "[t]he door in this courtroom seems to swing in one direction [against the defendants]," 461 F.2d at 396, a remark somewhat similar to one made by Mr. Goldman to Judge Wilson, he failed to mention that, in addition, respondent called the judge "inhuman" and his actions "disgraceful." *Id.* Moreover, the judge characterized counsel's remarks throughout the trial as insulting and sarcastic. Defense counsel attacked the judge's honesty and integrity–referring to the proceedings as a "legal lynching" and "the ultimate outrage in American justice," to cite just two of a long list of egregious remarks–and repeatedly challenged the judge to find him in contempt. *Id.* Furthermore, the trial judge claimed the defense attorneys worked in concert to "bait" him. *See id.* The defendants included Bobby Seale, and the highly publicized, political trial went on for five months. *See id.* at 391-92. The single remark respondent lifted from this case is significantly less striking when viewed in the proper context. We do not find *In re Dellinger* at all comparable to the circumstances here. Furthermore, we have reviewed all the cases on which respondent relies in which disqualification was required based on purportedly comparable remarks or conduct. Viewed in their proper context, we find none of them sufficiently comparable to the circumstances in this case so as to support disqualification.

After considering respondent's two remarks towards Judge Wilson in the context presented herein, the court does not find that they rise to the level of disrespect to or criticism of the judge that reasonably could be taken to undermine his impartiality. *See Griffin*, 84 F.3d at 830-31. Accordingly, we conclude that Judge Wilson is not disqualified from the contempt hearing on the foregoing basis.

Among the additional grounds respondent cites for disqualifying Judge Wilson,[1] two deserve some discussion: 1) the possibility that the judge would be called as a witness regarding disputed facts, and 2) the appearance that he has prejudged the willfulness of respondent's behavior based on the judge's comments at trial.

Disqualification is required if the judge is likely to be a material witness to the proceedings. *See* 28 U.S.C. § 455(b)(5)(iv); Fed. R. Evid. 605. Respondent claims that some of his conduct that may be at issue–finger pointing, shouting and screaming, and entering the well of the court–is not adequately reflected in the written record. Unlike oral statements that are taken down verbatim by the court reporter, nonverbal aspects of respondent's alleged acts cannot be directly recorded by the reporter unless statements describing the conduct are made for the record. Respondent argues that while statements describing such conduct were made for the record, the statements are supposedly subject to challenge as to factual accuracy.

Even assuming there are such disputed facts, it does not follow that Judge Wilson is likely to be a necessary witness. Respondent makes no showing that Judge Wilson would be the only source for such facts as may be in dispute. In short, the need for Judge Wilson to serve as a witness appears remote and speculative. Indeed, respondent has cited no controlling authority for the proposition that, under similar circumstances, the judge must be recused. We conclude that the remote and speculative possibility that the judge might be a witness in these circumstances does not require disqualification.

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[1] Although we have considered all of the respondent's claimed bases for disqualification, not all of them are worthy of specific discussion herein. We conclude that none requires recusal under the appropriate applicable standard.

Respondent also claims that Judge Wilson has prejudged key elements of the contempt allegation based on remarks the judge made during the trial. He quotes the court as stating, "I issued that citation [for contempt] because I have finally concluded that you willfully and flagrantly disregarded my directives." In addition, he reports that Judge Wilson said that the respondent "refuse[d] to follow my directions," "had disregard[ed] my instructions," and had "taken liberties" in the courtroom. Respondent fails to give sufficient context for these comments to show that they reflect prejudgment. To justify even commencing contempt proceedings, the judge must be of the opinion that misconduct sufficient to be characterized as contempt has taken place. We view these comments as amounting to no more than the judge's statement of a proper basis for contempt proceedings. The court concludes that there is no basis to recuse Judge Wilson for purported prejudgment of the issues to be determined at the contempt hearing. Based on the foregoing, respondent's request to recuse Judge Wilson is DENIED.

IT IS SO ORDERED.

DATED: This 15th day of September, 1998

/s/_____
GEORGE H. KING
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MILES GALIN, Defendant.	) CR 96-885(a) SVW)) ORDER TO SHOW) CAUSE RE:) CRIMINAL) CONTEMPT OF) ROBERT E.) GOLDMAN
ROBERT E. GOLDMAN, Contemnor	)))

I. BACKGROUND[1]

Attorney Robert E. Goldman represented defendant Miles Galin in his criminal trial. The trial commenced on June 16, 1998. The jury began its deliberations on June 24, returning a guilty verdict on June 29. At a June 12 pre-trial conference, the Court, recognizing that Goldman was a member of the New York bar not accustomed to appearing in California courts, explained the basic ground rules for trial: (1) lawyers are to argue from the lectern, and must ask for leave of court to depart from the lectern; (2) when making an objection, lawyers should state the legal ground, and should not argue the objection in front of the jury; and (3) lawyers should be non-combative, and may not talk to each other.[2]

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[1] All cites to the trial transcript refer to the volume and page of the rough overnight transcripts prepared by the court reporter.

[2] *See* Appendix A. These basic ground rules to insure a fair and dignified trial are neither unusual nor onerous. *See, e.g.*, Edward J. Imwinkelried, *Evidentiary Foundations* 13 (3d ed. 1995) (opponent must not make a speaking objection); E. Gardner Brownlee, National College of the State Judiciary, *Trial Judges Guide: Objections to Evidence* § 1.13, at 11-13 (3d ed. 1977) (judge should not permit lawyer to give

Throughout the trial, Goldman repeatedly violated the above rules laid out by the Court. He continuously argued objections in front of the jury in utter disregard of the Court's pre-trial order and despite no fewer than nineteen admonitions by the Court during the trial.[3] He failed to follow courtroom protocol in violation of the Court's orders. On numerous occasions, the Court told Goldman to stay out of the well of the courtroom, to argue from the lectern, and to approach witnesses only after receiving leave of court. Goldman violated each and every one of these instructions.[4] Finally, Goldman was disruptive and combative in front of the jury, at sidebar, and in chambers in that he: (1) waved documents in the air while screaming at a witness and at the jury; (2) pointed his finger at a witness while yelling at the jury; (3) pointed his finger at the prosecutor while shouting at him; (4) refused to keep his voice down during several sidebars, forcing the Court to continue the discussion in chambers; (5) disregarded the Court's sustaining of objections on relevancy grounds by continuing to pursue the same line of questioning;[5] and (6) inappropriately commented on the Court's evidentiary rulings during questioning and during closing argument.[6]

On three consecutive trial days (June 18, 19, and 23), the Court explicitly warned Goldman regarding his inappropriate

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reasons for objection or state the ground in the form of an argument in presence of jury).

[3] *See* Appendix B.

[4] *See* Appendix C.

[5] *See United States v. Griffin*, 84 F.3d 820, 833 (7th Cir. 1996) (holding counsel in criminal contempt where he willfully defied court's prohibition on line of questioning by attempting to ask prohibited question three times).

[6] *See* Appendix D.

conduct.[7] Despite these crystal clear admonitions, the following exchange took place on June 24, during Goldman's closing argument:

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[7] On June 18, after Goldman once again argued an objection in front of the jury, the Court dismissed the jury and stated:

> THE COURT: Mr. Goldman, I'm about to reach the end of my patience with you. And I want to say this to you in a calm but clear manner.
>
> You refuse to follow my instructions. Your views about my rulings I respect and you can make those arguments if it comes to it at a later time. But one thing you have to do is follow my instructions.
>
> When I ask you not to argue objections or to comment on things that I say, those are not for discussion. If I have been unfair with you in some way, I'm certain that a reviewing court will pass upon that.
>
> But you have disregarded my instructions and taken liberties that in my view are uncalled for. I cannot admonish you before the jury because I don't want to have your client affected by anything that I say to you.
>
> But this is the last warning. When I make a ruling and I sustain an objection, overrule an objection, that's the ruling.

(Vol[.] III, 72:24-73:21).

On June 19, during an in-chambers discussion, Goldman shouted and repeatedly interrupted the Court. The Court once again warned Goldman of the possible consequences:

> THE COURT: Don't tell me no again. If you do one more time, if you interrupt me one more time in that fashion, I will be compelled to do something I don't want to do. This is the last warning you have.

(Vol. IV, 30:25-31:3).

Finally, on June 23, after Goldman pointed his finger at the Court and yelled, the Court, outside the presence of the jury, gave Goldman one last warning about his conduct:

> THE COURT: And let me tell you this now that I have finally reached my wit's end. I cannot manage this case. Your conduct is intolerable and I've resisted this four or five days, but I am now telling you as a last resort because I cannot deal with this any longer, that if you

MR. WHITTLESEY: Objection. No evidence, Your Honor.

MR. GOLDMAN It's his testimony. He said it on the stand.

THE COURT: Again, you've done that.

MR. GOLDMAN: Your Honor, may we have the criticism once directed in [that] direction?

THE COURT: Approach the side bar. [AT SIDEBAR] I am now citing you for contempt for willfully violating my order. Proceed with your argument.

(Vol. VI, 107:15-108:1).

II. LEGAL ANALYSIS

-A court has the power to hold any person in criminal contempt for engaging in misbehavior that obstructs the administration of justice. *See* 18 U.S.C. § 401.[8] Contempt

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persist any longer in violating my instructions and direction, I am going to cite you for contempt.

And I've tried my best not getting to that point, the record will or will not reflect that, but you now have a clear warning.

Let me make it even clearer for you; (1) you are not to argue objections; (2) as I said at the outset, you are to stand up, make an objections and give a legal ground and wait for a ruling; (3) You are not to wander around the courtroom, especially in the well of the courtroom; (4) you are not to shout and point fingers at me or anyone else; and (5) you are not to engage in discussions with the prosecutor or anyone else unless the Court gives you leave to do so. Those are very clear and unambiguous directions.

(Vol. V, 187:9-188:12).

[8] Section 401 provides, in relevant part:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as - -

must be proved beyond a reasonable doubt. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992). The purpose of criminal contempt is to punish disobedience to judicial orders and to ensure that the judiciary has a means to vindicate its own authority. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987). When a court holds an attorney in criminal contempt for disobeying its orders, "the misconduct must entail a persistent disregard for the court's authority that the attorney could have avoided through a reasonable, good faith effort." *Weiss v. Burr*, 484 F.2d 973, 981 (9th Cir. 1973), *cert. denied*, 414 U.S. 1161 (1974).

The Federal Rules of Criminal Procedure provide for two distinct procedures by which to hold an individual in criminal contempt: summary disposition and disposition upon notice and hearing. *See* Fed. R. Crim. P. 42. The Court is proceeding under the latter. Rule 42(b), which governs contempt upon notice and a hearing, provides in pertinent part:

> A criminal contempt except [summary disposition] shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. If the contempt charged involves

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(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . . .

> disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent.

Id. Fed. R. Crim. P. 42(b).

The Court believes that Goldman willfully disregarded the Court's authority, thereby obstructing the Court's judicial duties and the administration of justice during the criminal trial of Miles Galin. The Court further believes that Goldman could have avoided this conduct through a reasonable, good faith effort.

In non-summary contempt cases, whether the time allowed to prepare a defense is reasonable depends on the circumstances of the particular case. *United States v. Lee*, 720 F.2d 1049, 1053 (9th Cir. 1983); *see United States v. Marthaler* 571 F.2d 1104, 1105 (9th Cir. 1978) (twenty days sufficient); *In re Allis* 531 F.2d 1391, 1393-95 (9th Cir.) (ten minutes sufficient), *cert. denied*, 429 U.S. 900 (1976); *United States v. Hawkins*, 501 F.2d 1029, 1031 (9th Cir.) (one day sufficient), *cert. denied*, 419 U.S. 1079 (1974). Based on the totality of circumstances involved in this case, the Court concludes that twenty (20) days is a reasonable amount of time to allow Goldman to prepare a defense.

"There is a sixth amendment right to a trial by jury in serious, but not petty, criminal contempt cases. Whether a criminal contempt is serious or petty is determined by the severity of the penalty authorized. If the contempt is charged under a statue that authorizes a maximum penalty greater than $500 or six months' imprisonment, there is a right to a jury trial regardless of the penalty actually imposed. Absent a specific statutory authorization of a maximum penalty, the severity of the penalty actually imposed determines whether the contempt was serious or petty. Where no maximum penalty is specified, a contemnor may be sentenced to up to six months; imprisonment and fined as much as $500 without a jury trial." *United States v. Rylander*, 714 F.2d

996, 1005 (9th Cir. 1983) (citations omitted), *cert. denied*, 467 U.S. 1209 (1984).

Section 401 of Title 18 does not authorize a maximum penalty for criminal contempt. However, the Court hereby limits the potential penalty to either a maximum imprisonment of six months or a maximum fine of $500. Accordingly, Goldman does not have a Sixth Amendment right to a jury trial in this "non-serious" offense.

Finally, as the facts forming the basis of the contempt citation do not involve disrespect or criticism of the Court, there is no basis for recusal.[9]

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[9] Mere violations of a district judge's orders do not constitute the type of disrespect or criticism of the judge that requires disqualification of the judge from adjudicating a contempt proceeding. *United States v. Griffin*, 84 F.3d 820, 830 (7th Cir. 1996). There were, however, two occasions during the trial in which Goldman arguably criticized the Court. First, during an in-chambers conference on June 19, the following exchange took place:

> MR. GOLDMAN: I would like the record to reflect I believe that yesterday today and the day before, the Court's approach to never permitting me to finish a thought before engaging in its own momentum only demonstrates a bias which I think at this point, Your Honor, is beginning to show the manner in which it is not a fair trial.
>
> THE COURT: Let me say, Mr. Goldman, the record speaks for itself and at the end, for whatever it is worth, it will reflect whether or not I exhibited a bias or not. I don't feel that I have biased you in any way. My views don't control. It is what the record reflects. Now let's get back to the issues at hand.

(Vol. IV, 31:4-15). Second, just prior to the Court's contempt citation of Goldman, Goldman argued an objection in front of the jury, and was admonished once again. In response, Goldman stated: "Your Honor, may we have the criticism once directed [that] direction." (Vol. VI, 107:15-21).

As explained in detail above, the contempt citation is based solely on Goldman's disregard of the Court's explicit orders relating to appropriate courtroom behavior. Goldman's first remark quoted above was wholly irrelevant to the Court's decision to cite him for contempt. The second

III. CONCLUSION

The Court believes that Goldman's above-described conduct obstructed the Court' judicial duties and the administration of justice during the criminal trial of Miles Galin. Accordingly, Robert E. Goldman is ORDERED to SHOW CAUSE in writing by August 3, 1998 why he should not be held in criminal contempt for engaging in this conduct. A hearing on this matter is scheduled for August 10, 1998 at 10:00 a.m.

IT IS SO ORDERED.

DATED: 7/15/98

/s/_____
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE
[CLERK'S CERTIFICATE OF SERVICE]

---

comment did in part form the basis for the contempt citation, but only insofar as it constituted another violation of the Court's explicit and repeated order not to argue objections and comment on the Court's rulings in the jury's presence. Furthermore, these remarks do not rise to the level of criticism or disrespect that would require recusal, especially given the Court's responses. *Compare Griffin*, 84 F.3d at 830-31 (no basis for recusal where attorney disobeyed court's ruling regarding scope of cross-examination and judge not personally embroiled with attorney); *In re Levine*, 27 F.3d 594, 597-98 (D.C. Cir. 1994) (no basis for recusal where attorney suggested that court was favoring government in its rulings and judge exhibited extreme patience), *cert. denied*, 514 U.S. 1015 (1995); *and Pennsylvania v. Local Union 542*, 552 F.2d 498 (3d Cir.) (no basis for recusal where attorney repeatedly disobeyed court's order not to make speaking objections and judge exhibited patience and restraint), *cert. denied*, 434 U.S. 822 (1977); *with In re Dellinger*, 461 F.2d 389, 395-96 (7th Cir. 1972) (recusal required where judge was recipient of numerous and unprecedented attacks and insults, such as being called inhumane, disgraceful, and dishonest, that were apt to strike "at the most venerable and human qualities of a judge's temperament").

APPENDIX A

COURT'S PRETRIAL INSTRUCTIONS TO COUNSEL:

THE COURT: Lawyers, and I say this because I know you are out [of your] district and it's hard to know the practices of a Court when you are not regularly appearing in that Court, lawyers are expected to argue from the lectern. If you have need to depart from the lectern, you are to ask leave of Court.

When you make an objection, make the objection, state the legal grounds and don't argue the objection. If it's important, you can always ask permission to approach the side bar, although I frown upon that, I don't like side bar conferences, or we can argue it at recess. I prefer to argue matters that were ruled upon that counsel think may need reargument at the recess.

I don't want lawyers talking to each other certainly. I want the procedure to be dignified and not an exercise in combat.

(Excerpt from Pretrial Conference at 3:4-20).

APPENDIX B

ARGUING OBJECTIONS

[2][*] MR. WHITTLESEY: Objection. Improper argument, Your Honor. Irrelevant.
MR. GOLDMAN: This is what he will say, Your Honor.
[C.A. Excerpts of Record ("E.R.") 155; discussed in hearing at E.R. 431]

[3] MR. WHITTLESEY: Objection. Calls for speculation. Argumentative.
THE COURT: Sustained.
MR. GOLDMAN: Your Honor, the entire witness' --
THE COURT: I told you not to argue objections.
[E.R. 161; discussed in hearing at E.R. 433-37]

[4] THE COURT: Don't make this not binding objection. That's not a legal objection. I've asked you please to make legal objections and if further argument is necessary I'll invite it or you can request it. Make the objection, let me rule and let's please follow that process. Proceed.
[E.R. 163-64; discussed in hearing at E.R. 437-39]

[5] MR. WHITTLESEY: Objection; relevancy.
THE COURT: Sustained.
MR. GOLDMAN: Your Honor, this is cross-examination.
THE COURT: This is direct examination.

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[*] The bracketed numbers in the left-hand margin correspond to the "specification number" used by petitioner to identify the specific allegations in briefing before the district court and court of appeals. Specification 1 consisted of the in-chambers exchange in which petitioner suggested Judge Wilson was showing bias, set forth in full in the body of the Order to Show Cause. App. 72, n.9.

MR. GOLDMAN: No, Your Honor. This witness was called by Mr. Whittlesey. I didn't call her.

THE COURT: It doesn't make a difference it is direct or cross-examination. The question is whether it's relevant. There was an objection, and I sustained it.

[E.R. 207; discussed in hearing at E.R. 439-41]

[6] MR. WHITTLESEY: Objection; irrelevant.

THE COURT: Sustained.

MR. GOLDMAN: Straight cross, Your Honor.

THE COURT: I have ruled.

[E.R. 220; discussed in hearing at E.R. 441-42]

[7] MR. WHITTLESEY: Objection; Hearsay.

THE COURT: Sustained.

MR. GOLDMAN: Did she convey to Mr. Baudo, Your Honor.

THE COURT: I don't see the relevance of that. The objection is sustained.

[E.R. 221; discussed in hearing at E.R. 442-43]

[8] MR. GOLDMAN: Your Honor, if I can't cross-examine the witness that the government has called. I can't get to that point.

THE COURT: [The objection has been sustained.] Mr. Goldman, you know, as I said before, I certainly admire the zeal in which you have represented your client, but I told you that it is improper to argue before the jury unless I invite it. And you've agruged [sic] an objection before the jury. That's inappropriate and contrary to my rules. And I don't want you to do it again. When I rule, I have ruled. Proceed. Ask the next question.

[E.R. 222-23; discussed in hearing at E.R. 443-45]

[9] MR. WHITTLESEY: Objection; Relevance.

THE COURT: Sustained.

MR. GOLDMAN: Goes to the state of mind, Your Honor.

THE COURT: Don't argue the objection. The objection is sustained.

[E.R. 226; discussed in hearing at E.R. 446-47]

[10] MR. WHITTLESEY: Objection; relevancy, Your Honor.

THE COURT: Sustained.

MR. GOLDMAN: Your Honor, this was the pressure that was brought to bear.

THE COURT: The objection is sustained.

[E.R. 229-30; discussed in hearing at E.R. 447-48]

[11] THE COURT: Objection is overruled.

MR. GOLDMAN: Your Honor, may --

THE COURT: Overruled is overruled and be seated. Would the jury please step out for a moment. [JURY OUT] Mr. Goldman, I'm about to reach the end of my patience with you. And I want to say this to you in a calm but clear manner.

You refuse to follow my directions. Your views about my rulings I respect and you can make those arguments if it comes to it at a later time. But one thing you have to do is follow my instructions.

When I ask you not to argue objections or to comment on things that I say, those are not for discussion. If I have been unfair with you in some way, I'm certain that a reviewing court will pass upon that.

But you have disregarded my instructions and taken liberties that in my view are uncalled for. I cannot admonish you before the jury because I don't want to have your client affected by anything that I say to you.

But this is the last warning. When I make a ruling and I sustain an objection, overrule an objection, that's the ruling.

[E.R. 234-35; discussed in hearing at E.R. 448-51]

[12] MR. WHITTLESEY: Objection, Your Honor, hearsay.
THE COURT: Sustained.
MR. GOLDMAN: It is on the tape, Your Honor.
THE COURT: The tape speaks for itself.
[E.R. 304; discussed in hearing at E.R. 451-53]

[13] MR. WHITTLESEY: Objection, Relevance.
THE COURT: Sustained.
MR. GOLDMAN: May I --
THE COURT: No, you may not.
MR. GOLDMAN: I believe if I can just --
THE COURT: You may not. I have ruled, Proceed.
MR. GOLDMAN: Agent Medrano, isn't it true that the only thing that changed between the date of arrest and the date of the indictment was –
THE COURT: Objection. My objection. You are violating my ruling before. Do not ask that question again.
[E.R. 307; discussed in hearing at E.R. 453-54]

[14] MR. WHITTLESEY: Objection. Hearsay, Your Honor.
THE COURT: Sustained.
MR. GOLDMAN: It's her statement, Your Honor. She is here to be cross-examined.
MR. WHITTLESEY: Move to strike, Your Honor.
MR. GOLDMAN: It's her statement.
THE COURT: It's an out of court statement. It's still hearsay.
MR. GOLDMAN: She's stating a fact, Your --
THE COURT: Please don't argue objections in front of the jury.
[E.R. 312-13; discussed in hearing at E.R. 454-56]

[15] MR. GOLDMAN: Your Honor, I have offered it for the truth. The Court has admitted it for the purpose—

THE COURT: Approach the side bar. [SIDEBAR] Respectfully, Mr. Goldman, just 30 seconds ago I asked you please not to argue evidentiary rulings.
MR. GOLDMAN: I didn't argue an evidentiary ruling.
THE COURT: You just did, Mr. Goldman, in front of the jury.
[E.R. 315-16; discussed in hearing at E.R. 456-58]

[16] MR. WHITTLESEY: Objection. Relevance, Your Honor.
THE COURT: Sustained.
MR. GOLDMAN: Your Honor --
THE COURT: Please don't argue that objection. I sustained the objection.
[E.R. 319; discussed in hearing at E.R. 458-62]

[17] MR. WHITTLESEY: Objection. Hearsay, Your Honor.
THE COURT: Sustained.
MR. GOLDMAN: This is the transcript, Your Honor, the one that Mr. Whittlesey has been reading from.
THE COURT: Can't you please follow my admonition and not argue objections? I've ruled.
[E.R. 320; discussed in hearing at E.R. 462-63]

[18] MR. WHITTLESEY: Objection; Relevance.
THE COURT: Sustained.
MR. GOLDMAN: May we approach, Your Honor. He brought it up.
THE COURT: I keep asking you not to argue objections.
[E.R. 329; discussed in hearing at E.R. 464-66]

[19] MR. WHITTLESEY: Objection; Relevance.
THE COURT: Sustained.
MR. GOLDMAN: Your Honor, there is tag line –
THE COURT: I told you not to argue objections and you're violating that order.
[E.R. 330; discussed in hearing at E.R. 469-72]

[20] MR. WHITTLESEY: Objection, Speculation.
THE COURT: Sustained.
MR. GOLDMAN: It is not speculation, Your Honor.
THE COURT: I've asked you at least 20 times during this trial to not argue objections before the jury. I have ruled and please ask your next question.
[E.R. 332; discussed in hearing at E.R. 472-75]

[21] MR. WHITTLESEY: Objection; Relevance.
THE COURT: Sustained.
MR. GOLDMAN: May I approach, Your Honor?
THE COURT: Not at this time.
MR. GOLDMAN: Your Honor, will keep in mind --
THE COURT: I asked you not to argue objections. The Court has ruled. Move on.
[E.R. 341-42; discussed in hearing at E.R. 475-78]

[22] MR. WHITTLESEY: Objection; Relevance, Hearsay.
THE COURT: Sustained.
MR. GOLDMAN: State of mind, Your Honor.
THE COURT: I asked you not to argue the objection. The objection is sustained.
[E.R. 345; discussed in hearing at E.R. 478-80]

[23] THE COURT: I'm not inviting this argument in front of the jury.
MR. GOLDMAN: Take a break and let me argue outside the presence of the jury, Your Honor.
THE COURT: The objection is sustained on this particular conversation between Weatherby and the Defendant. That's my ruling proceed.
[E.R. 347; discussed in hearing at E.R. 480-82]

[24] MR. WHITTLESEY: Objection; Relevancy, Hearsay.
THE WITNESS: Yes.

THE COURT: Sustained. Move on from this topic and if it becomes necessary we can readdress it.

MR. GOLDMAN: I can't, Your Honor. It explains the entire motivation for everything that follows.

THE COURT: I asked you not to argue in front of the jury. You do that every time in violation of my order. That's inappropriate. You're going to have an opportunity to argue the case at the end. Now don't violate my order any more. Ask another question.

[E.R. 348-49; discussed in hearing at E.R. 482-85]

[25] MR. WHITTLESEY: Objection; Hearsay.

MR. GOLDMAN: Goes to his state of mind.

THE COURT: I asked you not to argue the objections.

[E.R. 354; discussed in hearing at E.R. 487-89]

[26] MR. WHITTLESEY: Objection. Speculation, Your Honor.

MR. GOLDMAN: Argument, Your Honor.

THE COURT: Give me a chance to rule.

[E.R. 381; discussed in hearing at E.R. 492]

[27] MR. WHITTLESEY: Objection. No evidence, Your Honor.

MR. GOLDMAN: That's her testimony, Mr. Whittlesey. That's her testimony.

THE COURT: I keep admonishing you not to argue in response to an objection. The jury can use its own memory in determining what the evidence is.

[E.R. 384-385; discussed in hearing at E.R. 492-93]

[28] MR. WHITTLESEY: Objection. Misstates the evidence, Your Honor.

MR. GOLDMAN: I don't think so. The jury's recollection will --

THE COURT: For the 30th time I've asked you not to argue in front of the jury until I seek argument. The objection is sustained.

[E.R. 388-89; discussed in hearing at E.R. 493-95]

[29] MR. WHITTLESEY: Objection. No evidence, Your Honor.

MR. GOLDMAN: It's his testimony. He said it on the stand.

THE COURT: Again, you've done that.

MR. GOLDMAN: Your Honor, may we have the criticism once directed in this direction.

THE COURT: Approach the side bar. [SIDEBAR] I am now citing you for contempt for willfully violating my order. Proceed with your argument.

[E.R. 389-90; discussed in hearing at E.R. 495]

APPENDIX C
FAILING TO FOLLOW COURTROOM PROTOCOL

[30] THE COURT: Don't approach the witness and please stay out of the well.
MR. GOLDMAN: I apologize, Your Honor.
[E.R. 162; discussed in hearing at E.R. 500-01, E.R. 580]

[31] THE COURT: Mr. Goldman, don't walk around in the well of the courtroom.
[E.R. 206; discussed in hearing at E.R. 501-04, 580-81]

[32] THE COURT: Please don't march around the courtroom. Position yourself near or at the lectern. I have asked you to do that several times. Please comply with my order.
[E.R. 348; discussed in hearing at E.R. 499-500, 504-07, 581]

[33] THE COURT: You are walking in the well. You are not standing where I asked you to. [Judge then explains the protocol to the jury.]
[E.R. 356; discussed in hearing at E.R. 507-09, 581]

[34] [JURY OUT] THE COURT: You continually stand in the well. Stand in back of the lectern.
[E.R. 357; discussed in hearing at E.R. 509-11]

[35] [JURY OUT] MR. GOLDMAN: Can you tell where on this transcript?
THE COURT: Don't talk to Mr. Whittlesey any more.
MR. GOLDMAN: I don't know where on this --
THE COURT: And remove yourself from the well. Be seated.

MR. GOLDMAN: Your Honor, let the record reflect, I don't know where on this transcript he is. I don't even know where to look on the transcript.

THE COURT: Don't raise your voice and be seated. We are starting to listen to the tape.

[E.R. 365; discussed in hearing at E.R. 511-13, 581]

[36] THE COURT: Please, I told you before the argument to argue from behind the lectern.

[E.R. 378; discussed in hearing at E.R. 513-16]

APPENDIX D

OTHER MISCONDUCT

[37] THE COURT: [SIDEBAR] I don't want to admonish you in front of the jury. There was an objection. I ruled. I found it irrelevant. You then went back and tried to make the same point in a very, very similar, if not identical way. That demonstrates a disregard for my ruling. You are not to disregard my ruling.

[E.R. 177; discussed in hearing at E.R. 528-31]

[38] THE COURT: [SIDEBAR] I will accept that explanation, but I don't like proceeding where people pick up transcripts, wave them around and bolt from the lectern into the well as if you were going to attack the witness. That's not the style here.

MR. GOLDMAN: It was inadvertent.

THE COURT: So I accept your explanation. Let nothing more be said about it, but don't let it happen again.

[E.R. 185; discussed in hearing at E.R. 531-34]

[39] THE COURT: [SIDEBAR] Keep your voice down.

MR. GOLDMAN: I'm sorry. And permitting Mr. Whittlesey –

THE COURT: Keep your voice down. Can't you modulate your voice:

MR. GOLDMAN: Your Honor --

THE COURT: Don't speak so loud. Speak in softer tones. The jury is only 15 feet away.

[E.R. 194; discussed in hearing at E.R. 535-57]

[40] MR. GOLDMAN: [SIDEBAR] Your Honor, also further—

THE COURT: One minute. I told you I will give you a chance to make a record. What in God's name is the matter with you?

[E.R. 195; discussed in hearing at E.R. 535-37]

[41] MR. GOLDMAN: [JURY OUT] He never did. That is a down right lie.

THE COURT: Mr. Goldman, let the record reflect that you just rose, shouted, pointed your finger in an obnoxious manner at the prosecutor, and said what you said.

There are better ways to say things. I'm not making a judgment at this point, but that type of reaction just has no place in these proceedings. I don't know how I can persuade you that that isn't the way things should go.

Now, I am sitting here calmly trying to make a determination. You may be right. I don't know. I want to get to the boughs of this. It doesn't help me when you try to get me going by way of some melodrama. That's not my job. I am supposed to be neutral and impartial and calm about these things. I want to do the right thing for both sides. That doesn't help me.

[E.R. 200; discussed in hearing at E.R. 537-42]

[42] THE COURT: Now you deserve an admonishment, Mr. Goldman. You do deserve an admonishment because I have really wanted not to do this. But you have just waived a piece of paper in your hand, screamed at the jury, and in the most inappropriate way, and that is not what a trial is about. Lawyers are not supposed to do those things. This is not psychodrama. This is a trial.

[E.R. 243; discussed in hearing at E.R. 542-46]

[43] THE COURT: [JURY OUT] Stop screaming. You are yelling at him.

MR. GOLDMAN: I'm sorry.

THE COURT: I mean there is no jury here. Are you trying to move me with your animation?
MR. GOLDMAN: No, Your Honor.
THE COURT: I'm trying very hard to find out what's going on and I can almost see it's not the jury, it's just your style.
MR. GOLDMAN: It is my style.
THE COURT: And we are sitting here at a hearing five after 5:00 trying to do something that should have been done pretrial and you are screaming and yelling.
[E.R. 259; discussed in hearing at E.R. 546-48]

[44] THE COURT: [SIDEBAR] You're speaking too loudly. You are again speaking so loudly the jury can hear you.
[E.R. 277]

[45] THE COURT: [IN CHAMBERS] You don't allow me to complete my thoughts. You keep saying, "No. No." I want to hear what the prosecutor has to say and then I will listen to you.
[E.R. 280; discussed in hearing at E.R. 552-53]

[46] THE COURT: [IN CHAMBERS] Here we are in chambers and you are shouting in my chambers. You can't shout.
MR. GOLDMAN: I am not --
THE COURT: Isn't he shouting?
LAW CLERK: Yes.
[E.R. 282; discussed in hearing at E.R. 548-49]

[47] THE COURT: [IN CHAMBERS] Don't tell me no again. If you do one more time, if you interrupt me one more time in that fashion, I will be compelled to do something I don't want to do. This is the last warning you have.
[E.R. 282-83; discussed in hearing at E.R. 553-55]

[48] THE COURT: [SIDEBAR] Mr. Goldman, once again you shouted, pointed your finger four or five times at the jury and at the witness.

THE GOLDMAN: I didn't point at the jury.

THE COURT: You faced the jury and pointed your finger at the witness.

MR. GOLDMAN: I looked straight at the witness, Your Honor.

THE COURT: But you shouted and –

MR. GOLDMAN: Your Honor --

THE COURT: Am I hard of hearing? Did he shout or what?

MR. WHITTLESEY: I heard a shout, Your Honor.

THE COURT: And I keep telling you that that's just inappropriate. I am doing all I possibly can to make sure that both sides get a fair trial. Why are you making it so difficult for me? I implore you, don't disregard my instructions. Please don't shout and point you finger at the witness. Let's go back.

[E.R. 292-93; discussed in hearing at E.R. 549-51]

[49] THE COURT: You are asking the same question a different way and disregarding the objection and the ruling. In my view that's not relevant. Please move on to something else.

[E.R. 333-34; discussed in hearing at E.R. 557-58]

[50] MR. WHITTLESEY: Objection; Relevance.

THE COURT: Sustained.

MR. GOLDMAN: Did you send him to the University of Wisconsin --

THE COURT: I just sustained the objection on relevance grounds and you proceeded to ask the same question in a slightly different way. Please don't do that in the future.

[E.R. 335; discussed in hearing at E.R. 558-60]

[51] MR. GOLDMAN: In asking her to pick up the package and having the conversation such as was permitted to be discussed, did you advise Ms. Weatherby --

THE COURT: That's an inappropriate question. Don't comment on the court's ruling. Ask the question in a straightforward way please.

[E.R. 351; discussed in hearing at E.R. 560-61]

[52] THE COURT: [JURY OUT] Don't yell and point your finger at me. Put your finger down. It's right there. Put that finger down and don't yell.

MR. GOLDMAN: Your Honor --

THE COURT: And let me tell you this now that I have finally reached [my] wits end. I cannot manage this case. Your conduct is intolerable and I've resisted this for four or five days, but I am now telling you as a last resort because I cannot deal with this any longer, that if you persist any longer in violating my instructions and directions, I am going to cite you for contempt.

And I've tried my best not getting to that point, the record will or will not reflect that, but you now have a clear warning.

Let me make it even clearer for you; (1) you are not to argue objections; (2) as I said at the outset, you are to stand up, make an objection and give a legal ground and wait for a ruling; (3) You are not to wander around the courtroom, especially in the well of the courtroom; (4) you are not to shot and point fingers at me or anyone else; and (5) you are not to engage in discussions with the prosecutor or anyone else unless the Court gives you leave to do so. Those are very clear and unambiguous directions.

[E.R. 368-69; discussed in hearing at E.R. 551-52]

[53] MR. GOLDMAN: [CLOSING] And again, Mr. Whittlesey argues here, he went A, B, C, D, E. And I ask

you to recall, I started to go A, B, C, D & E and the court asked me to move on.

So that we were prepared –

MR. WHITTLESEY: Objection. Improper argument.

THE COURT: That is improper argument. You've made an argument like that earlier and the Court's rulings on objections and why those objections were made on either side is not relevant at all. It's something the Court does. And so I am sustaining the objection.

[E.R. 394; discussed in hearing at E.R. 561-63]

Supreme Court, U.S.
FILED
APR 11 2001

No. 00-1107

In the Supreme Court of the United States

ROBERT E. GOLDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
JOHN C. KEENEY
Acting Assistant Attorney General
SANGITA K. RAO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the conduct that formed the basis of the criminal contempt charge against petitioner involved disrespect to or criticism of the judge, so as to require the judge's disqualification under Federal Rule of Criminal Procedure 42(b).

2. Whether a finding of obstruction of justice is required before an attorney may be held in non-summary criminal contempt under 18 U.S.C. 401(3) for in-court conduct.

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In the Supreme Court of the United States

No. 00-1107

ROBERT E. GOLDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 222 F.3d 1123. The decisions of the district court (Pet. App. 15a-73a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2000. A petition for rehearing was denied on October 20, 2000. Pet. App. 13a. The petition for a writ of certiorari was filed on January 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a hearing in the United States District Court for the Central District of California, petitioner

was convicted on one count of criminal contempt, in violation of 18 U.S.C. 401(1) and (3). Petitioner was sentenced to three days' imprisonment. The court of appeals affirmed. Gov't C.A. Br. 2-3; Pet. App. 2a.

1. Petitioner, an attorney who practices primarily in New York, represented Miles Galin in a criminal trial before a jury in the United States District Court for the Central District of California. See *United States* v. *Galin*, No. CR-96-00885-SVW (June 29, 1998), aff'd, No. 99-50205, 2000 WL 554266 (9th Cir. May 5, 2000), 217 F.3d 847 (Table). District Judge Stephen V. Wilson presided at the trial.[1] The *Galin* trial commenced on June 16, 1998, and jury deliberations began eight days later, on June 24th. Pet. App. 2a; Gov't C.A. Br. 3.

At a pretrial conference on June 12, 1998, the district court, recognizing that petitioner was not accustomed to appearing in California federal courts, issued instructions to all counsel on proper courtroom procedures. The court explained to petitioner and the other attorneys that: (1) attorneys were required to argue from the lectern and to ask leave of court to depart from the lectern; (2) when making an objection, attorneys were allowed only to state the legal ground and were not allowed to argue the objection in front of the jury; and (3) attorneys were required to conduct themselves in a non-combative manner and were not allowed to address

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[1] Despite petitioner's contrary suggestion—and in a case petitioner himself relies upon, Pet. 3 n.1—the court of appeals has hailed Judge Wilson as "an exceptionally able, hard-working, and conscientious jurist." *Martel* v. *County of Los Angeles*, 34 F.3d 731, 732 (9th Cir. 1994) (reversing district court's discovery ruling), opinion withdrawn and superseded in part on rehearing en banc, 56 F.3d 993 (9th Cir.) (affirming district court's discovery ruling), cert. denied, 516 U.S. 994 (1995).

each other during court. 6/12/98 Pretrial Conf. Tr. 2-3.[2] Immediately before jury selection, the district court again reminded the attorneys that they must stand behind the lectern while arguing, and again explained that the attorneys were not allowed to intrude into the well of the courtroom—which is roughly the area between the judge's bench and counsel tables—without permission. 6/16/98 Trial Tr. 184; Pet. App. 29a.

Petitioner persistently disregarded those orders during trial, despite escalating warnings from the court. Petitioner repeatedly argued objections in front of the jury, rather than requesting a sidebar or waiting for a recess as the district court had ordered, despite no fewer than 19 admonitions from the court not to do so. See Pet. App. 3a-4a (cataloguing the numerous times the district court ordered petitioner not to argue objections); *id.* at 75a-82a (same). Petitioner repeatedly violated the court's orders that he remain behind the

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[2] The court stated:

> Lawyers, and I say this because I know you are out [of] the district and it's hard to know the practices of a Court when you are not regularly appearing in that Court, lawyers are expected to argue from the lectern. If you have need to depart from the lectern, you are to ask leave of Court.
>
> When you make an objection, make the objection, state the legal grounds and don't argue the objection. If it's important you can always ask permission to approach the side bar, although I frown upon that, I don't like side bar conferences, or we can argue it at a recess. I prefer to argue matters that were ruled upon that counsel think may need reargument at the recess.
>
> I don't want lawyers talking to each other certainly. I want the procedure to be dignified and not an exercise in combat.

6/12/98 Pretrial Conf. Tr. 2-3.

lectern and not walk into the well of the courtroom without permission, despite more than six admonitions from the district court. See *id.* at 4a (cataloguing the numerous times the district court ordered petitioner not to intrude into the well of the courtroom); *id.* at 83a-84a (same). In addition, petitioner violated other district court orders and instructions in numerous other instances, including incidents in which he "waived [*sic*] documents in the air, pointed at witnesses and the prosecutor, spoke in an inappropriately loud voice on a number of occasions, * * * interrupted the Court * * *, pursued lines of questioning to which the Court had sustained objections, and inappropriately commented on the Court's evidentiary rulings." *Id.* at 31a; see *id.* at 85a-90a (citing 17 instances). The court directly admonished petitioner, on numerous occasions during trial, not to engage in those specific behaviors. See *ibid.* (quoting the district court's repeated admonishments to petitioner); *id.* at 4a-5a. In addition, on three consecutive trial days (June 18, 19, and 23, 1998), the court warned petitioner about the severity of his misconduct and its consequences. Finally, the court declared: "I am now telling you as a last resort * * * that if you persist any longer in violating my instructions and directions, I am going to cite you for contempt." 6/23/98 Trial Tr. 187; see 6/18/98 Trial Tr. 50-51, 56 (additional warnings); 6/19/98 Trial Tr. 30-31 (same).

Despite those admonitions and warnings, on June 24, 1998, during closing statements, petitioner once again argued an objection in front of the jury and commented on the court's ruling, at which point the court informed petitioner, outside the presence of the jury, that it was going to him cite him for contempt. 6/24/98 Trial Tr. 107. On July 15, 1998, pursuant to Federal Rule of

Criminal Procedure 42(b), the district court issued an Order to Show Cause why it should not hold petitioner in contempt under 18 U.S.C. 401. Pet. App. 66a-90a. Section 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 401. The show-cause order listed 52 specifications of contemptuous conduct,[3] including 28 instances where petitioner improperly argued an objection in front of the jury, seven instances where petitioner failed to argue from the lectern or entered the well of the courtroom without permission, and 17 instances in which petitioner was disruptive or combative. Pet. App. 75a-90a.

In his response to the show-cause order, petitioner asked that Judge Wilson be disqualified from adjudicating the contempt charge under Federal Rule of Criminal Procedure 42(b), 28 U.S.C. 455, and the Due Process

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[3] Petitioner incorrectly asserts (Pet. 4) that there were 53 specifications of contempt. Petitioner erroneously includes an episode on June 19, 1998, involving an in-chambers discussion during which petitioner suggested Judge Wilson was showing bias. The district court, however, did not allege or consider that episode to be contemptuous. Pet. App. 72a n.9. See also p. 12, *infra*.

Clause. Judge Wilson found no reason to disqualify himself but, pursuant to local court rules, see C.D. Cal. Gen. Order No. 224 (Oct. 22, 1993), the motion to disqualify was also referred to District Judge George H. King for determination. Gov't C.A. Br. 5-6. Judge King also denied the recusal motion, concluding that there was no basis to disqualify Judge Wilson. The record, Judge King concluded, demonstrated no circumstances raising reasonable questions about Judge Wilson's impartiality. Pet. App. 61a-63a.

On October 29, 1998, the court held an evidentiary hearing on the contempt charge, at which petitioner testified and presented evidence.[4] After the hearing concluded, the district court found petitioner in criminal contempt and sentenced him to three days' incarceration, but stayed execution of sentence pending appeal. Gov't C.A. Br. 7. Later, while preparing a written order, the court observed that the show-cause order had "inadvertently only cited subsection one" of 18 U.S.C. 401 "for the Court's authority to hold [petitioner] in contempt," even though 18 U.S.C. 401(3) was applicable because the contempt involved violations of the court's orders. Pet. App. 16a-17a; see *id.* at 69a & n.8. Accordingly, the court allowed petitioner supplemental briefing on the applicability of Section 401(3). *Id.* at 58a-60a.[5]

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[4] The court conducted the contempt proceeding; the government did not participate. Gov't C.A. Br. 6 n.3.

[5] Although petitioner argued in the district court that he could not be convicted under Section 401(3) because he was deprived of adequate notice, the district court rejected that contention, Pet. App. 51a-57a, and petitioner did not renew it on appeal. Nor does he renew that contention in this Court.

On May 14, 1999, the district court entered its final order and judgment finding petitioner guilty on one count of criminal contempt of court, in violation of 18 U.S.C. 401(1) and (3). Pet. App. 15a-57a. The court found that petitioner willfully violated the court's clearly expressed orders by arguing objections in the presence of the jury and by walking in the well of the courtroom without permission. *Id.* at 38a. It also found that, in willful disregard of the court's rulings, petitioner commented on evidentiary rulings to the jury, "attempt[ed] to ask questions to which the Court had sustained objections; yelled in the courtroom; pointed his finger and gestured at the jury, a witness, and the prosecutor; and interrupted the Court." *Id.* at 31a-32a, 38a. Additionally, the court found that petitioner's conduct resulted in an obstruction of justice because his actions "wasted the time of the Court and the jury because it required the Court to continually admonish [petitioner], take unnecessary sidebars and recesses, interrupt the trial to explain protocol and even send the jury out of the courtroom." *Id.* at 38a. The court further found that "[petitioner's] conduct also caused general disruptions due to his shouting, walking around the courtroom, pointing, and addressing remarks to the prosecutor." *Ibid.*[6]

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[6] Petitioner suggests that the district court acted improperly in basing the contempt conviction on all 52 specifications of contemptuous conduct alleged in the show-cause order. Even if it were true that the evidence did not adequately support some of the specifications, reliance on improper incidents to support a contempt conviction is "harmless error where ample evidence supports the conviction after the improper evidence is disregarded and [the reviewing court is] convinced it did not affect the court's decision." *FTC* v. *American Nat'l Cellular*, 868 F.2d 315, 322 (9th Cir. 1989).

2. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-12a. The court rejected petitioner's argument that his conduct in arguing objections in front of the jury was justified to protect the record for appeal. Petitioner's argument, the court of appeals explained, was contradicted by Rule 103 of the Federal Rules of Evidence, which requires only a timely objection or offer of proof to preserve an issue for appeal, and which specifically provides that such matters should not be discussed in the presence of the jury "to the extent practicable." *Id.* at 8a (quoting Fed. R. Evid. 103(c)). The court also ruled that petitioner's proffered justifications for his conduct were irrelevant because, "even if the district court had adopted an impermissible practice, the attorney's remedy would have been to raise the issue on appeal, rather than repeatedly violating the court's instructions." *Ibid.*

The court rejected petitioner's argument that obstruction of justice is a necessary element of criminal contempt under 18 U.S.C. 401(3) where the charge is based on a criminal defense attorney's in-court conduct. Relying on its earlier decision in *United States* v. *Thoreen*, 653 F.2d 1332 (9th Cir. 1981), cert. denied, 455 U.S. 938 (1982), the court held that the text of Section 401(3) contains no such requirement. Pet. App. 9a-10a. Noting that "[t]he district court had to chastise [petitioner] on more than two dozen occasions for arguing objections, entering the well of the courtroom, raising his voice, interrupting the court, waving documents, and pointing," the court of appeals concluded that petitioner's "repeated disobedience" was a violation of the contempt statute. *Id.* at 10a.

The court also held that Judge Wilson did not err in presiding over the contempt hearing. The court explained that due process requires recusal of a judge

who, because he has become personally embroiled in a controversy, cannot adjudicate it impartially. Pet. App. 10a (citing *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465-466 (1971); *Offutt* v. *United States*, 348 U.S. 11, 17 (1954)). Applying that standard, the court stated that, while Judge Wilson "at times lost patience with" petitioner because petitioner was "fl[ou]ting the court's orders, the record does not support a contention that the judge was so 'personally embroiled' with [petitioner] that disqualification was necessary." Pet. App. 10a-11a. To the contrary, based on its review of the record, the court concluded that, "[a]lthough he repeatedly admonished [petitioner] for violating courtroom protocol, Judge Wilson exhibited restraint, patience, and respect toward [petitioner] throughout the trial." *Id.* at 11a.

ARGUMENT

1. Petitioner contends (Pet. 13-17) that Judge Wilson should have been disqualified from presiding at the contempt proceeding. That claim does not warrant further review.

a. Federal Rule of Criminal Procedure 42(b) requires that a judge be disqualified from presiding at the contempt hearing "[i]f the contempt charged involves disrespect to or criticism of a judge." According to petitioner, the decision below holds that Rule 42(b) requires disqualification only where "the judge is so 'personally embroiled' ([Pet.] App. 10a) as to violate Due Process." Pet. 14-15. Petitioner contends (Pet. 13-15) that the court of appeals' decision improperly conflates the disqualification provision of Rule 42(b) with the due process requirement of a fair and impartial adjudicator, see *Taylor* v. *Hayes*, 418 U.S. 488 (1974),

and conflicts with the decisions of other courts of appeals.

Petitioner's characterization of the court of appeals' opinion is incorrect. In its per curiam opinion, the court of appeals did not address petitioner's argument that Judge Wilson should have been disqualified under Rule 42(b). See Pet. App. 10a-12a. Rule 42(b) is not mentioned anywhere in the opinion. See *id.* at 1a-12a. Rather, the court of appeals limited its analysis to petitioner's claim that due process required Judge Wilson's disqualification. Significantly, in earlier rulings, the court of appeals has explicitly recognized that disqualification may be required under Rule 42(b) even where there has been no finding of a due process violation. See, *e.g.*, *United States* v. *Engstrom*, 16 F.3d 1006, 1011-1013 (9th Cir. 1994). Because the opinion here does not explicitly address Rule 42(b), it does not conflict with the decisions of any other court on the proper interpretation of that rule, and does not warrant this Court's review of any issue arising under that rule.[7]

Judges Wilson and King did not, in any event, abuse their discretion when they independently concluded that Judge Wilson should not be disqualified under Rule 42(b). See *Nilva* v. *United States*, 352 U.S. 385, 396 (1957) (decision whether to disqualify under Rule 42(b) reviewed for abuse of discretion); *United States* v. *Griffin*, 84 F.3d 820, 830 (7th Cir. 1996) (same). Petitioner was charged with contempt based on his repeated failure to follow the court's orders regarding, *inter alia*, not arguing objections in front of the jury, not intruding into the well of the courtroom without

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[7] Petitioner did raise his argument under Rule 42(b) in the court of appeals. The court of appeals, however, addressed only petitioner's due process claim.

permission, and not shouting or interrupting the court. Contrary to petitioner's contention (Pet. 14), repeated violations of a court's orders do not constitute "disrespect to or criticism of a judge" requiring the judge's disqualification. See, *e.g.*, *Nilva*, 352 U.S. at 395-396 (attorney's disobedience to subpoena not "disrespect[ful]" within the meaning of Rule 42(b)). Indeed, the very cases cited by petitioner (Pet. 15) disprove his assertions. For example, in *United States* v. *Griffin*, *supra*, the contemnor was a criminal defense attorney who, in order to put impermissible matters before the jury, repeatedly violated the court's orders limiting the scope of cross-examination. 84 F.3d at 833. Rejecting the contemnor's claim that the district judge was disqualified from presiding over the contempt proceeding under Rule 42(b), the Seventh Circuit ruled that "a theory that disrespect obtains in every violation of a district judge's order" is "untenable." *Id.* at 830. Likewise, in *In re Puerto Rico Newspaper Guild Local 225*, 476 F.2d 856 (1973), the First Circuit explained that "disobedience of a court order has been held not to fall within [the] category" of contempts requiring disqualification under Rule 42(b). *Id.* at 859.[8]

Petitioner relies on two statements that he made to the court during trial that were arguably critical of the court, as Judge Wilson acknowledged in the show-cause order. Pet. App. 72a n.9. First, during an in-chambers conference on the fourth day of trial, petitioner stated

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[8] See also *In re Grand Jury Proceedings*, 875 F.2d 927, 932 & n.5 (1st Cir. 1989) (contemnor's alleged violation of court order not grounds for disqualification of judge who issued the order); *United States* v. *Marx*, 553 F.2d 874, 877 (4th Cir. 1977) (attorney's failure to appear for trial not a personal affront to judge requiring disqualification under Rule 42(b)).

that "the Court's approach to never permitting me to finish a thought before engaging in its own momentum only demonstrates a bias which I think at this point, Your Honor, is beginning to show the manner in which it is not a fair trial." 6/19/98 Trial Tr. 31. Judge Wilson responded:

> Let me say, Mr. Goldman, the record speaks for itself and at the end, for whatever it is worth, it will reflect whether or not I exhibited a bias or not. I don't feel that I have biased you in any way. My views don't control. It is what the record reflects. Now let's get back to the issues at hand.

Ibid. Second, during closing argument, petitioner argued an objection in front of the jury, despite repeatedly having been ordered not to do so, and the court once again admonished him. In response, petitioner stated: "Your Honor, may we have the criticism once directed in [the prosecutor's] direction." 6/24/98 Trial Tr. 107.

Contrary to petitioner's claim, neither of those comments required Judge Wilson's disqualification. The first comment was not charged as contemptuous conduct by the district court. Pet. App. 72a n.9 (remark was "wholly irrelevant" to court's decision to cite petitioner for contempt); see *id.* at 75a-90a (list of district court's specifications of contemptuous conduct). As a result, it has no bearing on Rule 42(b) disqualification; that rule, by its terms, requires disqualification only "[i]f the contempt *charged* involves disrespect to or criticism of" the judge. Fed. R. Crim. P. 42(b) (emphasis added). Nor did the second comment necessitate Judge Wilson's disqualification. The second comment "did in part form the basis for the contempt citation, but only insofar as it constituted another violation of

the Court's explicit and repeated order not to argue objections and comment on the Court's rulings in the jury's presence." Pet. App. 73a n.9; see *Griffin*, 84 F.3d at 830 (mere violation of a judge's orders does not constitute disrespect under Rule 42(b)). In other words, the alleged criticism was not the basis for "the contempt charged"; rather, the contempt was based on petitioner's violation of the court's orders by arguing objections and commenting on rulings in front of the jury. Accordingly, the citation's reference to that comment did not subject Judge Wilson to disqualification.

Petitioner cites no case in which the mere presence of a brief comment like the one at issue here—"[m]ay we have the criticism once directed in [the prosecutor's] direction," 6/24/98 Trial Tr. 107—has required recusal under Rule 42(b). Nor does petitioner identify a case in which the contempt rested not on the allegedly critical nature of the comment but on the fact that the comment violated the judge's earlier and repeated orders not to argue objections or comment on the court's rulings in front of the jury.[9] *In re Pilsbury*, 866 F.2d 22 (2d Cir. 1989), the only case cited by petitioner in which recusal

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[9] Rule 42(b)'s disqualification provision is derived from *Cooke* v. *United States*, 267 U.S. 517 (1925). See Fed. R. Crim. P. 42 advisory committee's note. In *Cooke*, this Court concluded that the judge should have disqualified himself where a litigant had written a letter to the judge accusing the judge of prejudice in "severe language, personally derogatory to the judge" and "calculated to stir the judge's resentment and anger," 267 U.S. at 533-534, and the relationship "between the judge and the parties had come to involve marked personal feeling," as demonstrated by the judge's use of "unfair and oppressive" procedures in conducting the contempt hearing, *id.* at 538, 539. *Cooke* does not stand for the proposition that any comment that criticizes a ruling made by a judge automatically prohibits the judge from adjudicating the contempt.

was required under Rule 42(b), is easily distinguishable.[10] There, the contemnor was a lawyer who, according to the district judge himself, had treated the judge with "disdain," had "mock[ed]" the judge, had made "rude and disrespectful remarks," and had displayed "insolent behavior." *Id.* at 25, 28. Relying on the district judge's own statements, the Second Circuit observed that the district judge "clearly regarded [the attorney's] conduct as a personal affront to the court," and concluded that the judge was disqualified from conducting the contempt proceedings. *Id.* at 28. In contrast, the record in this case reveals that petitioner was not disrespectful to Judge Wilson, and that Judge Wilson did not regard petitioner as disrespectful. See, *e.g.*, Pet. App. 72a-73a n.9.

Courts have recognized the benefits of having the judge who witnessed the contempt preside at the contempt hearing; accordingly, disqualification should not be undertaken lightly. See *Nakell* v. *Attorney Gen. of N.C.*, 15 F.3d 319, 325 (4th Cir.) ("Because the acts in question are within the personal knowledge of the judge, that judge should preside whenever possible."),

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[10] Two of the cases cited by petitioner involved a summary contempt proceeding under Federal Rule of Criminal Procedure 42(a), and therefore Rule 42(b)'s disqualification provision was not at issue. See *In re Levine*, 27 F.3d 594, 597-598 (D.C. Cir. 1994), cert. denied, 514 U.S. 1015 (1995); *In re Chaplain*, 621 F.2d 1272, 1278 (4th Cir.) (Phillips, J., concurring in part and dissenting in part), cert. denied, 449 U.S. 834 (1980). In the remaining cases cited by petitioner, the court rejected the argument that violation of a court's orders constitutes the type of disrespect requiring a judge's disqualification under Rule 42(b). See *Griffin*, 84 F.3d at 830; *In re Grand Jury Proceedings*, 875 F.2d at 932 & n.5; *Marx*, 553 F.2d at 877; *In re Puerto Rico Newspaper Guild Local 225*, 476 F.2d at 859.

cert. denied, 513 U.S. 866 (1994). Under all the circumstances of this case, disqualification under Rule 42(b) was not required.

b. The Due Process Clause of the Fifth Amendment requires recusal where the trial judge is biased or might appear to be biased. *Taylor*, 418 U.S. at 501. In contempt cases, this Court has required recusal where the judge has become "personally embroiled" in the controversy with the alleged contemnor. *Offutt* v. *United States*, 348 U.S. 11, 17 (1954). It has also required recusal in non-summary contempt proceedings where the judge has been personally "vilified" by the contemnor. See *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971).

Primarily relying on *Offutt*, *supra*, petitioner contends (Pet. 15-17) that Judge Wilson should have been disqualified from presiding over the contempt proceedings because he exhibited a strong personal distaste for petitioner. The court of appeals correctly rejected that fact-bound contention. Pet. App. 10a-12a. Petitioner violated the court's orders not to argue objections more than 20 times, while also disobeying the trial court's orders on a variety of other matters. When viewed in context, the statements petitioner highlights as evidence of Judge Wilson's allegedly unfair hostility to petitioner at most "illustrate Judge [Wilson's] frustration" with petitioner's "continued" violations of the court's orders. *Griffin*, 84 F.3d at 831. Such "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display," do not warrant recusal. *Liteky* v. *United States*, 510 U.S. 540, 555-556 (1994); see *Offutt*, 348 U.S. at 17 (recusal required because the "[t]he record discloses not a rare flare-up,

not a show of evanescent irritation—a modicum of quick temper that must be allowed even judges"—but "an intermittently continuous wrangle on an unedifying level between the [judge and the contemnor]").

For example, despite petitioner's suggestion (Pet. 17 & n.3) that he was unfairly rebuked for attempting to learn what page of a transcript corresponded to a particular tape recording, the record reveals that Judge Wilson simply ordered petitioner to comply with three prior orders of the court—namely, that counsel should not address each other, that they not walk in the well of the courtroom without permission, and that they speak in moderate tones. 6/23/98 Trial Tr. 183-184. Likewise, while petitioner claims (Pet. 17) that he was subjected to an "unwarranted torrent of criticism" for stating three simple words—namely, "Your Honor, may"—the record shows that petitioner's statement constituted his *tenth* attempt to argue an objection in front of the jury after the court had already ruled on the matter, despite numerous prior admonishments from the court not to do so. Pet. App. 75a-77a; 6/18/98 Trial Tr. 72-74. The resulting rebuke by the trial judge is not evidence of improper judicial behavior; it was nothing more than an effort to bring a recalcitrant lawyer into compliance with the court's orders.[11] "A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration"—are not a basis for recusal. *Liteky*, 510 U.S. at 556; see *In re Union Leader Corp.*, 292 F.2d 381, 390 (1st Cir.) ("even a very considerable showing of irritation" by the judge does not demonstrate personal bias),

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[11] Indeed, the rebuke took place outside the jury's presence, and Judge Wilson gave petitioner the opportunity to argue the objection in full before bringing the jury back. See 6/18/98 Trial Tr. 74.

cert. denied, 368 U.S. 927 (1961); see also *United States* v. *Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997); *United States* v. *Nunez*, 801 F.2d 1260, 1266 (11th Cir. 1986).[12]

Furthermore, the facts of this case are not similar to either *Offutt* or *Taylor*, *supra*, in which recusal was required based on the personal animosity displayed by the judge. In *Offutt*, the entire course of the trial was "colored" by clashes of "increasing personal overtones" between the judge and the alleged contemnor-attorney. 348 U.S. at 12. To cite just a few examples, the judge in *Offutt* threatened to gag the attorney and stated to the jury that the attorney was "disgraceful," "disreputable," and "unworthy of being a member of the profession." *Id.* at 17 n.3. The judge further stated to the jury that he "blush[ed] that we should have such a specimen in our midst." *Ibid.* Those comments demonstrate a personal animosity not present here. *Ibid.* Similarly, in *Taylor*, the judge characterized the lawyer's behavior as "'the worst display' he had seen in many years at the bar," commented that, "[a]s far as a lawyer is concerned, you're not," threatened to gag the

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[12] Petitioner also takes out of context Judge Wilson's comments to petitioner at the post-trial proceeding regarding a trial exhibit. The record (see 6/29/98 Trial Tr. 6-14) reveals that petitioner was allowed a full opportunity to make his point, that Judge Wilson then sought certain information from the prosecutor, and that petitioner repeatedly interrupted Judge Wilson's inquiry despite Judge Wilson's having instructed petitioner that he would give petitioner the opportunity to respond "in a little bit" (*id.* at 9), or in "[j]ust one moment" (*id.* at 11; see also *id.* at 12). Finally, after petitioner persisted in interrupting the court, Judge Wilson warned petitioner that there would be consequences to petitioner's refusal to follow the court's directions. *Id.* at 13. Judge Wilson then, once again, patiently advised petitioner that he would "have an opportunity to address the Court." *Ibid.*

lawyer, and denied the lawyer the opportunity to speak in his own defense. 418 U.S. at 502.

In contrast, the court of appeals in this case correctly concluded that, "[a]lthough he repeatedly admonished [petitioner] for violating courtroom protocol, Judge Wilson exhibited restraint, patience, and respect toward [petitioner] throughout the trial." Pet. App. 11a; see *Paul* v. *Pleasants*, 551 F.2d 575, 585 (4th Cir.) (judge's compliments of contemnor's efforts at trial showed lack of bias), cert. denied, 434 U.S. 908 (1977). Indeed, the record is replete with instances of Judge Wilson's respectful and complimentary attitude towards petitioner. See, *e.g.*, 6/18/98 Trial Tr. 99 (stating that it is "admirable" that petitioner "is a zealous advocate"); *id.* at 19 (telling petitioner that it is "good" that he can get excited about a case, and that the court does not mind a "spirited debate"); *id.* at 51 ("I certainly admire the zeal in which you have represented your client."); 6/19/98 Trial Tr. 57-58 (telling petitioner that his cross-examination of a witness was "quite appropriate" and that he had "developed some good points").

Moreover, nothing in the adjudication of the contempt demonstrates personal antagonism on Judge Wilson's part. The numerous specifications of contemptuous conduct simply reflect petitioner's remarkable persistence in engaging in contumacious conduct, rather than demonstrating personal animosity on Judge Wilson's part. Furthermore, Judge Wilson gave petitioner a full and fair hearing. Petitioner was given notice, was represented by counsel, and allowed to present witnesses and evidence in his defense. See *Ungar* v. *Sarafite*, 376 U.S. 575, 588 (1964) (that contemnor was accorded hearing, rather than summarily judged, was evidence that judge had not become personally embroiled with contemnor); cf. *Weiss* v. *Burr*,

484 F.2d 973, 982 n.15 (9th Cir. 1973) (delay in adjudicating contempt diminishes likelihood that judge "imposed sentence 'while smarting under the irritation of the contemptuous act[s]'") (quoting *Sacher* v. *United States*, 343 U.S. 1, 11 (1952)), cert. denied, 414 U.S. 1161 (1974). Then, after deciding that petitioner was properly charged under Section 401(3) in addition to Section 401(1), Judge Wilson gave petitioner the opportunity for supplemental briefing on the matter. Accordingly, in light of all those circumstances, the record does not demonstrate that Judge Wilson was "personally embroiled" with petitioner such that he had the appearance or the actuality of bias in presiding over petitioner's contempt proceeding. *Taylor*, 418 U.S. at 501-502.

Relying primarily on *Mayberry* v. *Pennsylvania*, *supra*, petitioner contends that recusal was required because "brief comments impugning a judge's impartiality are, without more, sufficient to require the judge's disqualification." Pet. 16. That is not correct. In *Mayberry*, the record revealed that the alleged contemnor had engaged in "brazen efforts to denounce, insult, and slander the court." 400 U.S. at 462. As this Court recounted, "[m]any of the words leveled at the judge in [that] case were highly personal aspersions, even 'fighting words'—'dirty sonofabitch,' 'dirty tyrannical old dog,' 'stumbling dog,' and 'fool.'" *Id.* at 466. The judge had ordered the alleged contemnor gagged. *Id.* at 462. Given the highly charged circumstances, the Court ruled that the contemnor should be granted a trial "before a judge other than the one reviled by the contemnor." *Id.* at 466. At the same time, however, the Court specifically acknowledged that "[i]t is, of course, not every attack on a judge that disqualifies him from sitting." *Id.* at 465. Thus, in *Ungar*, 376 U.S. at 584,

this Court held that the defendant's statement that he was being "badgered" and "coerced" by the judge was "disruptive, recalcitrant and disagreeable commentary, but hardly an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." This Court further observed that "[w]e cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." *Ibid.* Likewise, petitioner's comments to the court during the trial were moderately worded disagreements with the court's rulings, rather than the type of "insulting attack" that requires disqualification of the judge. *Ibid.*

The court of appeals cases relied on by petitioner (Pet. 16-17) similarly fail to support his claim that "brief comments impugning a judge's impartiality" require disqualification. In *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972), recusal was required where the defendant not only stated that "[t]he door in this courtroom seems to swing in one direction [against the defendants]," but also called the judge "inhumane" and his actions "disgraceful," and the judge characterized counsel's remarks throughout the trial as insulting and sarcastic. *Id.* at 396. Likewise, in *United States* v. *Meyer*, 462 F.2d 827 (D.C. Cir. 1972), the court explicitly rested its recusal decision not merely on the fact that, in one of the charged acts, the contemnor accused the judge of bias, but also on the trial judge's characterization of the contemnor's conduct as "insulting, derogatory, and disrespectful." *Id.* at 844-845. Indeed, refuting petitioner's argument, the court in *Meyer* explicitly stated that "some comments about the trial judge, viewed in

context, are not sufficiently personal" to require disqualification for bias. *Id.* at 841.[13]

2. Petitioner renews his claim (Pet. 18-22) that lawyers may be held in contempt under 18 U.S.C. 401(3) for their courtroom conduct only where it actually obstructs justice. The text and structure of Section 401 refute that argument. Unlike Section 401(1), which requires that the "[m]isbehavior * * * obstruct the administration of justice," Section 401(3) does not include an obstruction requirement. 18 U.S.C. 401(3). Instead, contempt under Section 401(3) is premised on "[d]isobedience" to the district court's "lawful writ, process, order, rule, decree, or command," without regard to consequences or results. 18 U.S.C. 401(3). Perhaps for that reason, petitioner suggests that an obstruction element must, in effect, be read into Section 401(3) to protect zealous advocacy. That contention lacks merit, and does not otherwise warrant further review.

The contempt power is vested in courts to vindicate their authority. *International Union, UMWA* v. *Bagwell*, 512 U.S. 821, 831 (1994); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795-796 (1987). As this Court has recognized, "[t]he underlying concern that gave rise to the contempt power was not * * * merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial." *Id.* at 798. Thus, contrary to petitioner's contention, disobedience of a court's commands

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[13] *Bakalis* v. *Golembeski*, 35 F.3d 318, 326 (7th Cir. 1994), cited by petitioner (Pet. 17), is completely inapposite. In that case, the court concluded that evidence that a college board of trustees had prejudged an employment decision precluded the board from receiving qualified immunity.

is punishable under the contempt power, whether or not it results in an obstruction of justice. See *Maness* v. *Meyers*, 419 U.S. 449, 458 (1975) ("all orders and judgments of courts must be complied with promptly"; those who disobey "generally risk criminal contempt even if the order is ultimately ruled incorrect"). Two courts of appeals now have explicitly so ruled. See Pet. App. 9a-10a; *Taberer* v. *Armstrong World Indus., Inc.*, 954 F.2d 888, 901 n.16 (3d Cir. 1992) (recognizing the need for courts to be able to exercise the contempt power against attorneys "to vindicate the court's authority, although there is no actual obstruction of the administration of justice").

Under petitioner's contrary rule, lawyers could willfully and flagrantly defy a court's direct orders in the name of zealous courtroom advocacy, as long as the defiance does not reach some threshold level that amounts to obstruction of justice.[14] Zealous advocacy, however, "can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge * * * with power to curb both adversaries." *Sacher*, 343 U.S. at 8. Accordingly, attorneys must obey the court's commands whether or not failure to do so will obstruct justice. To deprive courts of authority to enforce their rules absent an obstruction of justice would substantially erode the judicial power, and thereby subvert the orderly administration of justice. *Young*, 481 U.S. at 796 ("If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the

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[14] Petitioner offers no reason for distinguishing a lawyer's in-court conduct from out-of-court conduct, as zealous advocacy involves both.

judicial power of the United States' would be a mere mockery.") (quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)); *In re Holloway*, 995 F.2d 1080, 1088 (D.C. Cir. 1993) (allowing counsel to disobey court's orders would lead to "a sprawling chaos that would render the adjudication close to random"), cert. denied, 511 U.S. 1030 (1994). Nothing in the Constitution (if that is the basis for petitioner's claim) requires such a result. If a court's orders unduly interfere with effective representation, the remedy is to appeal or seek relief through mandamus. *Maness*, 419 U.S. at 458-459; see also *Walker* v. *City of Birmingham*, 388 U.S. 307, 320 (1967) (a court's orders, even if constitutionally invalid, must be obeyed until reversed by a higher court); *United States* v. *Allocco*, 994 F.2d 82, 85 (2d Cir. 1993) ("Even if [the attorney-contemnor] felt that the order was unreasonable, it was nonetheless clear; any objection he had to the order simply should have been preserved on the record."); *In re Gustafson*, 650 F.2d 1017, 1020 (9th Cir. 1981) (remedy for error in court rulings was by mandamus or appeal, not disobedience). "Zealous advocacy of a client's cause is never a legitimate excuse for disobeying a clear ruling of the court, and convicting an attorney of contempt for actual disobedience will not chill criminal defense attorneys from zealous advocacy within the bounds of the law." *In re Ellenbogen*, 72 F.3d 153, 158 (D.C. Cir. 1995).[15]

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[15] Thus, petitioner's disobedience of the court's orders to refrain from arguing objections in front of the jury was not immune from sanction merely because petitioner allegedly did not seek to put prejudicial information in front of the jury. Cf. *Pounders* v. *Watson*, 521 U.S. 982 (1997) (affirming contempt conviction of attorney who, in the course of violating court's orders, put prejudicial information in front of the jury). Nor is petitioner justified in relying (Pet. 21 n.5) on various authorities stating the unremarkable rule

Petitioner in any event errs in asserting (Pet. 18-20) that this Court and others require proof of an obstruction of justice in non-summary contempt proceedings under Section 401(3). The cases upon which petitioner relies all arose under Section 401(1), or involved *summary* contempt proceedings under Rule 42(a). Unlike non-summary contempt proceedings under Rule 42(b), summary contempt under Rule 42(a) may be imposed without procedural protections such as notice of the charges, a hearing, the assistance of counsel, and the right to call witnesses. See *Harris* v. *United States*, 382 U.S. 162, 165-167 (1965) (describing importance of Rule 42(b) procedures); *Cooke* v. *United States*, 267 U.S. 517, 537 (1925). Because all of those protections play an important role in ensuring that the contempt power is not abused, this Court has specifically predicated resort to the "drastic procedures of the summary contempt power" under Rule 42(a), *In re McConnell*, 370 U.S. 230, 234 (1962), on the "exceptional circumstances," *Harris*, 382 U.S. at 164, occasioned by contemptuous conduct that obstructs justice. Accord *Pounders* v. *Watson*, 521 U.S. 982, 989 (1997); *In re Oliver*, 333 U.S. 257, 274-275 (1948).

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that a party must state the grounds upon which evidence is admissible in order to preserve the issue for appeal. See Fed. R. Evid. 103(a)(2). Petitioner does not claim that any of those authorities state that counsel may or should make such statements in front of the jury, see Fed. R. Evid. 103(c) (offers of proof should not be made in the hearing of the jury), or that such statements should or must be made despite a court's contrary orders. That petitioner many times requested a side bar or recess instead of arguing an objection in front of the jury shows that he knew that the record could be adequately preserved in other ways. Pet. App. 26a (citing 29 instances).

While a finding of obstruction is required before an individual may be held in *summary* contempt, no court has held that a finding of obstruction of justice is required in a *non-summary* proceeding *under Section 401(3)*. For example, although petitioner relies (Pet. 18-19) on this Court's decision in *In re McConnell*, *supra*, that case involved a summary proceeding, and was brought under Section 401(1), which expressly requires obstruction. 370 U.S. at 233; p. 21, *supra*. Similarly, *In re Little*, 404 U.S. 553, 555 (1972) (cited Pet. 19), involved a summary proceeding, and was brought under a local statute requiring obstruction as an element of contempt. In each case, both the summary nature of the proceeding and the statutory provision at issue required obstruction of justice before the accused could be held in contempt. See, *e.g.*, *In re McConnell*, 370 U.S. at 236 (concluding that lawyer's conduct did not "amount to an obstruction of justice that can be punished under the limited powers of summary contempt which Congress has granted to the federal courts").[16] Petitioner's reliance (Pet. 19) on *In re Dellinger*, 461 F.2d at 400, is unavailing for identical reasons; that case too was a summary contempt proceeding under Section 401(1), rather than a non-sum-

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[16] Petitioner's reliance (Pet. 19-20) on *In re Michael*, 326 U.S. 224, 228 (1945), and *Clark* v. *United States*, 289 U.S. 1, 11 (1933), is likewise unavailing. In neither case did this Court hold that a finding of obstruction is required in all non-summary contempt proceedings. Rather, in both cases, this Court required a finding of obstruction simply "to bring about the exceptional conditions," *Ex parte Hudgings*, 249 U.S. 378, 383 (1919) (quoted in both *In re Michael* and *Clark*), that would allow a witness or jury member, respectively, to be held in contempt for conduct that amounted to perjury. See *United States* v. *Dunnigan*, 507 U.S. 87, 93-94 (1993).

mary contempt case under Section 401(3). See 461 F.2d at 391.[17]

Nor can *United States* v. *Lumumba*, 794 F.2d 806 (2d Cir.), cert. denied, 479 U.S. 855 (1986), be read as holding that obstruction is required in a non-summary contempt case under Section 401(3). In *United States* v. *Martin*, 525 F.2d 703, cert. denied, 423 U.S. 1035 (1975), the Second Circuit carefully distinguished between the requirements of subsections (1) and (3) of Section 401, and explicitly held that a "contempt conviction under § 401(3) for disobedience of a lawful order of the court d[oes] *not* require a finding of obstruction of justice." *Id.* at 710 (emphasis added). In so holding, the court stated that its earlier decision in *In re Williams*, 509 F.2d 949, 960 (2d Cir. 1975), a summary contempt case, should not be read as incorporating the obstruction of

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[17] For the same reasons, petitioner errs when he states (Pet. 21-22 n.6) that the Ninth Circuit had, until the decision below, held obstruction to be a "substantive element of the offense of contempt in cases involving attorneys." The earlier cases on which petitioner relies (Pet. 21 n.6)—*In re Greenberg*, 849 F.2d 1251, 1254-1255 (9th Cir. 1988), *Hawk* v. *Cardoza*, 575 F.2d 732, 735 (9th Cir. 1978), and *Weiss*, 484 F.2d at 979—all involved *summary* contempt. In *In re Greenberg*, the Ninth Circuit specifically stated that "a district court should not *summarily* convict an attorney of criminal contempt unless that attorney 'create[s] an obstruction which blocks the judge in the performance of his judicial duty.'" 849 F.2d at 1255 (emphasis added) (quoting *In re McConnell*, 370 U.S. at 236). Interpreting its own precedent, the court of appeals in this case concluded that *United States* v. *Thoreen*, 653 F.2d 1332, 1339 (9th Cir. 1981), cert. denied, 455 U.S. 938 (1982), stood for the proposition that there was no obstruction element in Section 401(3). See Pet. App. 9a-10a. Accordingly, petitioner's challenge based on the Ex Post Facto Clause (Pet. 22 n.6) is entirely unsupported, and there is no reason to hold the case pending decision in *Rogers* v. *Tennessee*, cert. granted, 529 U.S. 1129 (2000).

justice requirement of Section 401(1) into Section 401(3). *Martin*, 525 F.2d at 709. *Lumumba*, without citing *Martin*, quoted *Williams* for the proposition that, "[n]ot long ago," the court had decided that criminal contempt requires obstruction. 794 F.2d at 808. That statement, however, was not necessary to the result; *Lumumba* did not reverse a contempt conviction under Section 401(3) based on the absence of obstruction. In light of *Martin*'s clear statement that obstruction is *not* an element of non-summary contempt under Section 401(3), *Lumumba*'s dictum cannot be read as establishing the contrary rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
SANGITA K. RAO
Attorney

APRIL 2001

(3)

Supreme Court, U.S.
FILED
APR 26 2001
CLERK

No. 00-1107

IN THE
Supreme Court of the United States

ROBERT E. GOLDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

JOHN P. ELWOOD
BAKER BOTTS, L.L.P.
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 639-7700

NATHAN LEWIN
Counsel of Record
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004
(202) 434-7300

Attorneys for Petitioner

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STATEMENT

The Solicitor General's extraordinarily lengthy Brief in Opposition protests too much. It also persists in the fundamental error committed by the court of appeals. Rather than examine the transcript which is the verified record of the proceedings and which demonstrates that Mr. Goldman made no statements and engaged in no conduct that actually violated Judge Wilson's order not to "argue objections," the Solicitor General relies on Judge Wilson's barrage of

inaccurate and intemperate characterizations of Mr. Goldman's statements. There were, to be sure, "escalating warnings from the court" (Br. in Opp. at 3), "no fewer than 19 admonitions from the court" (*id.*), "repeated admonishments to petitioner" (*id.* at 4), and multiple "admonitions and warnings" (*id.*). But what Mr. Goldman actually said (*see* Pet. at 5-10) did not justify these outbursts from the trial judge. It is, therefore, wholly erroneous to infer from the judge's repeated and baseless attacks on the petitioner -- motivated by sheer personal hostility -- that the petitioner actually "persistently disregarded" the judge's orders (Br. in Opp. at 3), "repeatedly argued objections" (*id.*), "repeatedly violated the court's orders" (*id.*), or that he "violated other district court orders and instructions in numerous other instances" (*id.* at 4).

In addition to being a gross miscarriage of justice, the decision of the Ninth Circuit presents significant legal issues of importance to the administration of justice in the federal courts. This Court should grant certiorari to decide these questions and to prevent any recurrence of such injudicious and intemperate behavior by a district judge.

I.

THE SOLICITOR GENERAL ACKNOWLEDGES A CONFLICT AMONG THE CIRCUITS THAT THE NINTH CIRCUIT DELIBERATELY CONCEALED

We noted in our Petition for Certiorari that the Ninth Circuit's affirmance of the ruling that Judge Wilson was not disqualified under Rule 42(b) conflicted with decisions of the First, Fourth, Seventh and D.C. Circuits. *See* Pet. at 15. The Solicitor General acknowledges that we argued to the Ninth Circuit that Judge Wilson had to be disqualified under Rule 42(b). Br. in Opp. at 10, n.7 ("Petitioner did raise his

argument under Rule 42(b) in the court of appeals.") The Solicitor General also agrees with us that other Circuits have interpreted Rule 42(b) to require disqualification beyond those instances covered by the Due Process Clause. The only reason why there is not a conflict warranting certiorari, according to the Solicitor General, is the remarkable proposition that the Ninth Circuit deliberately chose to conceal this legal issue in its opinion (Br. in Opp. at 10):

> In its per curiam opinion, the court of appeals did not address petitioner's argument that Judge Wilson should have been disqualified under Rule 42(b). . . . Rather, the court of appeals limited its analysis to petitioner's claim that due process required Judge Wilson's disqualification. . . . Because the opinion here does not explicitly address Rule 42(b), it does not conflict with the decisions of any other court on the proper interpretation of that rule, and does not warrant the Court's review of any issue arising under that rule.

In other words, courts of appeals are henceforth free to ignore conflicting legal rulings in other Circuits regardless of how fully the issue is presented to them, and they need not anticipate that this Court will grant certiorari and decide a divisive legal issue so long as the court of appeals is sufficiently machiavellian to avoid any explicit reference to the legal issue that divides the Circuits. That is not tolerable under a rule of law. The standards for disqualification under Rule 42(b) were argued to the Ninth Circuit, and its decision in this case misapplies those standards under legal principles articulated by four other Circuits. Whether or not the Ninth Circuit chose to discuss the issue, its current interpretation of Rule 42(b) -- as manifested in this case -- sets a different standard for a trial judge's disqualification in the Ninth Circuit than in four Circuits comprising twelve States of the Union and the District of Columbia. That conflict is a sufficient reason to grant certiorari.

II.

THE UNCONSTITUTIONAL PROCEDURE BY WHICH PETITIONER'S GUILT WAS DETERMINED WAS NOT VITIATED BY SUPERFICIAL FORMALITIES OF FAIRNESS

Mr. Goldman's guilt or innocence was determined by the same person who, *sua sponte*, filed the formal allegation charging him with having violated his orders 52 times. In addition, the judge was the prosecutor at Mr. Goldman's trial because, as the Solicitor General notes, "the government did not participate." Br. in Opp. at 6, n.4. The Solicitor General tries to soften the obvious unfairness of such an imbalanced procedure by declaring that Judge Wilson harbored no "personal animosity" towards Mr. Goldman because Mr. Goldman's conduct was not as outrageous and personally offensive as the conduct of the lawyers or defendants involved in *Offutt v. United States*, 348 U.S. 11 (1954), *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), and *Taylor v. Hayes*, 418 U.S. 488 (1974). *See* Br. in Opp. at 17-19.

The anomaly of the Solicitor General's argument is that a lawyer like Mr. Goldman, who maintains an attitude of respect vis-à-vis a trial judge who subjects him to unfair criticism throughout a trial and also ultimately cites him for contempt, is subjected to trial and punishment by the judge who is his accuser, whereas the totally disrespectful lawyer is entitled to a fair and disinterested fact finder. Moreover, the distinction made by the Solicitor General renders trial by Judge Wilson more unfair, not less. The central issue for the finder of fact was whether Mr. Goldman had engaged in contemptuous conduct or whether he had tried to obey the court's orders while carrying out his obligation to his client. That was hardly a debatable issue in *Offutt*, *Mayberry* and *Taylor* in light of the words that the attorneys in those cases had actually employed. But it was a different question in

this case where what Mr. Goldman said was not disrespectful. Because Judge Wilson was not disqualified, that critical decision was made not by a neutral fact-finder but by Mr. Goldman's accuser.

The Solicitor General declares that Mr. Goldman was accorded "a full and fair hearing" on the contempt charge and had notice, the right to counsel, and the right to present witnesses and evidence. Br. in Opp. at 18. Although this gave the appearance of fairness, Judge Wilson's verdict -- after a recess that lasted not more than ten minutes -- that Mr. Goldman had deliberately committed all the specifications of contempt with which he was charged proved that the hearing was a sham. Judge Wilson's explanation for rejecting totally the detailed testimony of Mr. Goldman and his young trial associate -- "You weren't here. I was" -- demonstrated the unfairness of the judge's being accuser and trier-of-fact at the same time.*

Most extraordinary is the Solicitor General's additional proof that the proceeding against Mr. Goldman was fair and not biased -- i.e., that when he decided, after the contempt trial was over, to charge Mr. Goldman with contempt under Section 401(3), so that actual obstruction-of-justice would not have to be proved, Judge Wilson "gave petitioner the opportunity for supplemental briefing on the matter." Br. in Opp. at 19. In fact, Mr. Goldman's counsel was obliged affirmatively to seek such an opportunity; the judge's initial order did not invite briefs. Moreover, the extraordinary step of altering the charge after Mr. Goldman's trial so that it should be easier to convict the accused proves that the judge was intent on justifying his precipitous determination of guilt rather than arriving at a fair and impartial verdict.

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* Indeed, Mr. Goldman's counsel requested prior to the hearing that Judge Wilson take the stand and be subjected to cross-examination. The judge denied that request.

III.

IN ORDER TO ENABLE TRIAL LAWYERS TO REPRESENT THEIR CLIENTS ZEALOUSLY, ACTUAL OBSTRUCTION OF JUSTICE MUST BE ESTABLISHED FOR ANY IN-COURT CONTEMPT, WHETHER TRIED SUMMARILY OR ON NOTICE

In our Petition for Certiorari we quoted this Court's holding in *In re McConnell*, 370 U.S. 230, 236 (1962), that a lawyer's in-court conduct "cannot amount to a contempt of court" unless it "create[s] an obstruction which blocks the judge in the performance of his judicial duty." Pet. at 18-19. The Solicitor General erroneously seeks to limit this rule to summary contempt proceedings or to contempts brought under Section 401(1)

But the reasoning that underlies the holding in *McConnell* -- further amplified in *In re Little*, 404 U.S. 553, 555 (1972) -- bears no relation to whether the proceeding being conducted against the trial attorney is summary or plenary. A trial lawyer must know that he has latitude to engage in conduct that is "persistent, vociferous, contentious and imposing, even to the point of appearing obnoxious" (*In re Dellinger*, 461 F.2d 289, 400 (7th Cir. (1972)) in order to enable him to represent his client properly. It would be a meaningless assurance if he could be held in contempt for such zealous advocacy in a non-summary proceeding or under Section 401(3).

The Solicitor General and the Ninth Circuit rely on the absence of any language in Section 401(3) that limits prosecution to a case in which allegedly contemptuous conduct obstructs the administration of justice. *See* Br. in Opp. at 21; Pet. App. at 9a-10a. Because of this omission -- apparently noticed belatedly by Judge Wilson -- the district

judge amended his contempt citation after the trial and ultimately held (1) that Section 401(3) applied to courtroom conduct by a trial lawyer (Pet. App. at 44a-47a) and (2) that a trial lawyer could be guilty of contempt under Section 401(3) for statements and conduct in the courtroom without proof of actual obstruction of justice (Pet. App. at 47a-51a).

Whether the constitutional policies articulated in this Court's *McConnell* and *Little* opinions can be evaded by prosecuting a lawyer on notice for contempt under Rule 42(b) and under Section 401(3) is an important issue that this Court should resolve. As the *amicus curiae* brief of the National Association of Criminal Defense Lawyers and the Washington Association of Criminal Defense Lawyers supporting our petition for certiorari states, "[S]tandards for sanctionable misconduct [must] be clearly defined in a way that does not limit or chill a vigorous and zealous defense in federal criminal cases." Brief of *Amicus Curiae*, at 3. And the *amicus* concluded, on its review of the record, that what Mr. Goldman did in the courtroom in this case was not contemptuous at all but "should be considered good lawyering." *Id.* at 10.

In short, this case is not one in which a lawyer has "willfully and flagrantly def[ied] a court's direct orders in the name of zealous courtroom advocacy" as the Solicitor General suggests. Br. in Opp. at 22. The primary effect of affirming Mr. Goldman's contempt conviction, as the Ninth Circuit did, is to notify all lawyers who try cases in federal courts in Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon and Washington that great zeal in representing their clients and preserving the client's rights during a trial may result in a contempt sanction and a prison term.

CONCLUSION

For the foregoing reasons and those set forth in our Petition for Certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN P. ELWOOD
BAKER BOTTS, L.L.P.
The Warner
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 639-7700

NATHAN LEWIN
Counsel of Record
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004
(202) 434-7300

Attorneys for Petitioner

April 2001

(4)

Supreme Court, U.S.
FILED
JAN 29 2001
OFFICE OF THE CLERK

No. 00-1107

In the
Supreme Court of the United States

ROBERT E. GOLDMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR CERTIORARI

OF COUNSEL:
LISA B. KEMLER
108 NORTH ALFRED ST.
ALEXANDRIA, VA 22314
(703) 684-8000

DAVID ALLEN
Counsel of Record
CASSANDRA STAMM
600 UNIVERSITY ST.
SUITE #3020
SEATTLE, WA 98101
(206) 447-9681

Counsel for Amicus Curiae

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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ARGUMENT

I. Introduction

This case provides the Court the opportunity to review 18 U.S.C. § 401(3) which has been utilized in this case to punish an alleged contempt by an attorney. The question unanswered by this Court's prior decisions is whether 18 U.S.C. § 401(3), which permits a court to punish disobedience of a "lawful writ, process, order, rule, decree, or command," requires, at a minimum, proof of obstruction of the administration of justice when applied to an attorney representing a client at trial where there is no suggestion or evidence of the attorney violating a court order by presenting excluded evidence before the jury.

Absent a ruling by this Court on this important matter, defense counsels' responsibility to provide zealous advocacy will be chilled by a fear that they may run afoul of a judge's order or rule, especially in the context of the instant case where the trial judge's verbal order was as vague and general as telling attorneys that they should not "argue the objection," and where the majority of the alleged contumacious conduct was as brief as two or three word statements indicating grounds for an objection.

The other issue that this Court should review is whether a trial judge, who himself noted he had been "arguably criticized" on two occasions by defense counsel, can conduct the trial on the non-summary contempt, in spite of Fed. R. Crim. P. 42(b)'s clear statement that such a judge is "disqualified."

The power of judges to accuse, try, and imprison for contempt with but limited legal and constitutional protections

for the accused, has the potential to create an atmosphere that chills the essential level of advocacy that a defense attorney must bring into court. A lack of clearly defined principles for the application of the law of contempt has created a state of confusion and uncertainty that may cause defense counsel to view this flexible legal power with fear and concern, to the detriment of their clients who expect and need the highest level of zeal and advocacy.

II. Interest of Amicus Curiae[1]

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives is promotion of the proper administration of justice.

The Washington Association of Criminal Defense Lawyers (hereinafter "WACDL") is a non-profit corporation of approximately 700 lawyers, professors, law students and others which strives to improve the quality and administration

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[1] This brief was written wholly by David Allen, Cassandra Stamm and Lisa Kemler on behalf of WACDL and NACDL. Counsel for Mr. Goldman did not author any part of the brief. No other persons or entities made any monetary contribution to the preparation or submission of the brief.

justice and to protect the individual rights guaranteed by the Federal Constitution. Among its stated objectives is to encourage the cooperation and professionalism among counsel and the judiciary.

Amici's interest in this case arises because their members have a substantial interest in the substance and execution of the statutes and rules governing the imposition of criminal contempt sanctions against counsel for criminal defendants. Amici and their members firmly believe that while civility and decorum are consistent with vigorous advocacy, it is equally important that the standards for sanctionable misconduct be clearly defined in a way that does not limit or chill a vigorous and zealous defense in federal criminal cases. The discretion of judges to imprison lawyers for their advocacy, even where the lawyer speaks too loudly or otherwise acts in a manner that might be uncomfortable to some, though not reaching the level of obstruction, must be curtailed.

Pursuant to Supreme Court Rule 37.2(b), WACDL and NACDL have obtained consent from counsel for the Government and from counsel for Mr. Goldman to file this brief.

III. Statement of the Case

The Petitioner, Robert E. Goldman, is an experienced New York trial lawyer who has tried over 300 cases spanning more than 40 years of practice. In 1998, Mr. Goldman represented Miles Galin on charges of fraud in a criminal trial before a jury and the Honorable Judge Stephen V. Wilson in the United States District Court for the Central District of California.

At the beginning of the trial, Judge Wilson told counsel not to leave the lectern without permission and further to state legal grounds but not "argue the objection."

This statement of courtroom procedures became the subject of much controversy and, eventually, the foundation for the majority of Mr. Goldman's contempt convictions. Judge Wilson also reprimanded Mr. Goldman during the trial because his tone of voice was too loud, his arm and hand movements were "obnoxious" or "melodramatic," and because on occasion he stepped away from the podium when examining witnesses. Despite the fact that he had expressly directed the lawyers to "state the legal grounds" while making objections, Judge Wilson frequently reprimanded Mr. Goldman for making *exceedingly* brief statements in response to evidentiary objections, as a means of either preserving error or responding to the objection, while not reprimanding the prosecutor for similar conduct.[2]

Based upon these and other exchanges, Mr. Goldman perceived bias on the part of the trial court. Consistent with his obligation to his client, Mr. Goldman registered appropriate objections to this perceived bias of the Court. For example, during an in-chambers conference, Mr. Goldman complained that:

> the Court's approach to never permitting me to finish a thought before engaging in its own

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[2] For example, on one occasion, Mr. Goldman stated "[g]oes to his state of mind" in response to a prosecutor's hearsay objection, which resulted in a contempt conviction. By contrast, the prosecution's virtually identical response to Mr. Goldman's hearsay objection, *i.e.*, "[s]tate of mind," drew no comment or rebuke whatsoever from the Court.

> momentum only demonstrates a bias which I think at this point, your Honor, is beginning to show the manner in which it is not a fair trial.

Likewise, during closing argument, after the prosecutor had objected nine times, Mr. Goldman, stated: "[y]our Honor, may we have the criticism once directed in [the prosecutor's] direction." In response to this comment and its suggestion of bias, Judge Wilson cited Mr. Goldman for contempt.

Judge Wilson issued an Order to Show Cause, listing fifty-three incidents of allegedly contemptuous conduct under 18 U.S.C. 401(1). Judge Wilson specifically set forth two occasions on which Mr. Goldman criticized him for being biased and also noted that Mr. Goldman's comment during closing argument implying the court was biased, "did in part form the basis for the contempt citation."

Mr. Goldman moved to disqualify Judge Wilson from presiding over his contempt hearing, but his motion was denied by District Judge George H. King.

Judge Wilson subsequently found Mr. Goldman guilty of criminal contempt in violation of 18 U.S.C. § 401(1) and (3) and sentenced him to three days' imprisonment. The prosecution did not take part in the contempt prosecution or hearing. The Ninth Circuit affirmed. United States v. Galin, 222 F.3d 1123 (9th Cir. 2000).

IV. Reasons for Granting the Writ

A. The Ninth Circuit Misconstrued the Standard for Disqualification of the Trial Judge in a Contempt Proceeding.

Judge Wilson improperly presided over Mr. Goldman's contempt hearing despite the fact that the conduct charged involved judicial criticism and allegations of bias.

This Court has held that a judge conducting a contempt trial must be removed if at all involved in the controversy:

> The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feelings against a lawyer.

Offutt v. United States, 384 U.S. 11, 14 (1954).[3]

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[3] See also Sanchez v. United States, 343 U.S. 1, 12 (1952):

> That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir.

The record clearly reflects that Mr. Goldman made comments criticizing Judge Wilson. These criticisms challenged Judge Wilson's impartiality, thereby raising the core concern underlying Rule 42(b), which provides:

> If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. (Emphasis supplied.)

This rule recognizes that the contempt power entrusted to trial judges can be misapplied if the judge has been criticized or has been treated disrespectfully by counsel.

The Ninth Circuit opinion below effectively equated the Rule 42(b) "disrespect" and "criticism" standard with the less rigorous due process requirements, merely explaining that the trial judge was not so "'personally embroiled' with Goldman that disqualification was necessary."[4] 222 F.3d at 1127. In so doing, the Ninth Circuit ignored the record, which demonstrated that the requisites of Rule 42(b) were satisfied, in that the contempt charge involved "disrespect to or criticism" of the trial judge, requiring automatic disqualification.

Moreover, even if a court were to assume, *arguendo*, that the due process "personally embroiled" standard rather than Rule 42(b) governed, the record likewise demonstrates that Judge Wilson became frustrated with Mr. Goldman, not

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[4] Even where a judge remains calm in the face of a personal attack, he must be disqualified if "his personal feelings might reasonably be expected to have been affected. . . ." United States v. Meyer, 462 F.2d 827, 839-40 (D.C. Cir. 1972).

only one or two isolated occasions, but on a virtually continuous basis throughout the duration of the two week trial. Judge Wilson's criticisms, rebukes and warnings to counsel collectively reflect such a level of personal irritation and annoyance with defense counsel such that any reasonable observer would have to conclude that the trial judge was "personally embroiled" in the controversy of the underlying contempt proceedings.

The Ninth Circuit's decision in this case, coupled with its avoidance of Rule 42(b), waters-down the seemingly clear dictates on the rule, in contravention of this Court's holdings:

> The power of contempt which a judge must have and exercise ... is most important and indispensable. But its exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge.

Cooke v. United States, 267 U.S. 517, 539 (1925). Although "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties;" In re Murchison, 349 U.S. 133, 136 (1955); both due process generally and Rule 42(b) specifically nevertheless require recusal.

B. The Ninth Circuit Erred in Holding that Obstruction of Justice was not Required.

1. Obstruction of justice is required to support a violation of 18 U.S.C. 401(3).

A critical question presented in the instant case, necessitated by the trial court's eleventh-hour addition of the additional violation of 18 U.S.C. § 401(3), is whether an attorney's in-court conduct may be punished as criminal contempt, absent a showing of actual obstruction of justice.

Nearly 40 years ago, this Court held:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.

In re McConnell, 370 U.S. 230, 236 (1962); see also, In re Michael, 326 U.S. 224, 228 (1945) ("that element (obstruction) [*sic*] must clearly be shown in every case where the power to punish for contempt is exerted"); In re Little, 404 U.S. 553, 555 (1972) (the conduct at issue "must constitute an imminent, not merely a likely, threat to the administration of justice.").

Despite this Court's holdings, the Ninth Circuit below held that obstruction of justice was not a prerequisite to criminal contempt under 18 U.S.C. § 401(3) even though the contemnor was an attorney defending a criminal defendant and many of the contempt counts related to very brief

statements of grounds for objections or admissibility of evidence. In so ruling, the Ninth Circuit contradicted not only its own precedents,[5] but also this Court's holdings in McConnell, Michael, and Little, *supra*.

The decision below is remarkable in light of the resulting dilemma it creates for defense attorneys. Mr. Goldman was told on the one hand not to argue objections and reprimanded for even the briefest statements of legal grounds -- he was also, however, duty-bound to zealously represent his client in all facets of the criminal case, including explaining the grounds for his questions or objections, in a short and succinct non-argumentative fashion, as Mr. Goldman did throughout the trial, with the hope of educating the judge to his position. An attorney should be able to briefly reply to an opponent's objection, succinctly stating the legal ground, without further argument, in hopes that the court will reconsider. Such conduct can hardly be equated with contempt -- instead it should be considered good lawyering.[6]

A statement by the trial judge to not argue objections cannot be considered a reasonably specific order to cease such conduct.[7] The import of the opinion below is that by the

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[5] Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978); Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973) cert. denied, 414 U.S. 1161 (1974).

[6] "[T]rial attorneys are ethically obligated to argue with the court, to challenge its actions, and to attempt to change its mind." In re Holloway, 995 F.2d 1080, 1097 (D.C. Cir. 1993) (Mikva, J., dissenting).

[7] A comparable oral instruction not to "argue with me when I rule" was "not sufficiently definite or specific to support a contempt

Ninth Circuit's reasoning even a trivial violation of a broad or general oral rule of a trial judge can be punished as criminal contempt under 18 U.S.C. 401(3) regardless of whether the administration of justice was obstructed in any way.[8]

Where the briefest statement of grounds on an objection is inconsistently criticized and punished by a trial judge, the effect is a trial attorney must stand mute and not even attempt to clarify the grounds for his objection or the reason for a question, or else face the prospect of a criminal conviction and imprisonment. This creates a terrible conflict for the attorney, who in exercising his sworn duties to zealously represent his client, cannot even state, clarify or expand the ground for his objection or the reason for a question, without risking contempt. In this context, the accused will be the loser, and the interests of justice will suffer.

2. Petitioner's conduct did not constitute obstruction of justice.

Judge Wilson, in his post-trial Order, found that Mr. Goldman obstructed the administration of justice by wasting the court's time due to "unnecessary sidebars and recesses," caused by his conduct. The court also found that Mr. Goldman's conduct caused "general disruptions" due to his "shouting, walking around the courtroom, pointing, and addressing remarks to the prosecutor." However, the record does not support these findings.

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citation." United States v. West, 21 F.3d 607, 609 (5th Cir. 1994).

[8] This is hardly the "reasonably specific order of the court" that is required as a basis for a 18 U.S.C. 401(3) violation. Doe v. Maywood Hous. Auth., 71 F.3d 1294, 1297 (7th Cir. 1995).

The specifications and findings on contempt regarding "arguing objections" demonstrate that at most Mr. Goldman only said a few words detailing the ground for an objection or the justification for his questions.[9]

With regard to the allegation of not following courtroom protocol, the record reveals only a few occasions where the judge told Mr. Goldman to either not approach the witness or not walk into the well of the courtroom. Mr. Goldman did not respond in any contemptuous or rude manner, but instead apologized and returned immediately to the lectern as he was directed. There is no indication that this wasted any significant amount of time or disrupted the trial.

Another contempt citation that reveals the tenor of the trial judge's rulings occurred when the jury was excused, the prosecutor was reading from the transcript and Mr. Goldman merely asked the prosecutor to tell him from what page of the transcript he was reading, when he was harshly criticized and directed by the court to not talk to the prosecutor.

Perhaps most revealing is the fact that Mr. Goldman was cited for contempt for merely requesting permission to argue outside the presence of the jury:

> The Court: I'm not inviting this argument in front of the jury.

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[9] There are no instances of cited contempt where Mr. Goldman did more than say a few words, briefly explaining the reason for his question or objection. He never introduced prohibited or excluded facts in front of the jury.

> Mr. Goldman: [Let's] take a break and let me argue outside the presence of the jury, Your Honor.

In terms of alleged contempt relating to the amplitude of Mr. Goldman's voice, the judge on occasion told Mr. Goldman to lower his voice during a sidebar conference, not an unusual occurrence at trial. On another occasion, the judge complained that Mr. Goldman was "shouting" in his chambers, obviously once more outside the presence of the jury.

None of the actions ascribed to Mr. Goldman can satisfy the necessary requirement of obstruction of the administration of justice. Using contempt proceedings "to punish attorneys for over-zealous advocacy is contrary to the important principle of maintaining an independent and assertive bar." Matter of Greenberg, 849 F.2d 1251, 1255 (9th Cir. 1988).

Attorneys must be given "great latitude" and extreme "liberty" in the area of vigorous advocacy:

> Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting on their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows.

Matter of Dellinger, 461 F.2d 389, 400 (7th Cir. 1972).

In the instant case, the alleged contumacious conduct of Mr. Goldman did not result in physical disorder in the courtroom, there was no laughter, shouts, insults or abusive

language directed at the judge and there was no actual disruption of the trial proceedings. Any delay was no more than the routine interruptions that commonly take place in criminal trials. The record demonstrates that the judge became overly sensitive and critical of Mr. Goldman, criticizing his actions while taking no notice of the prosecutor's same or similar conduct. This is especially demonstrated by Judge Wilson's not even permitting Mr. Goldman to speak in a chambers conference, cutting him off rudely on several occasions when he was merely trying to make a point for the record.

In fact, Judge Wilson could be reasonably criticized for unfairly cutting off Mr. Goldman's very brief statement of grounds. An attorney's brief and non-contentious explanation of his legal position helps the orderly administration of justice:

> counsel must be given substantial leeway in pressing his contention, for it is through such colloquy that the judge may recognize his mistake and prevent error from affecting the record. It is, after all, the full intellectual exchange of ideas and positions that best facilitates the resolution of disputes.

Dellinger, 461 F.2d at 398-99.

C. The Decision of the Ninth Circuit Calls for Exercise of the Court's Supervisory Power in Order to Avoid a Chilling Effect on Zealous Representation of Criminal Defendants.

As this Court has repeatedly stated: "an independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice." McConnell, 370 U.S. at 236. Indeed, "[h]ard-fought, energetic and honest representation is at the bedrock of our judicial process." In re Yagman, 796 F.2d 1165, 1182, mod'd, 803 F.2d 1085 (9th Cir. 1986).

It is intolerable to convict an attorney for contempt for merely stating the legal grounds for his question in response to an objection in a case where his client's very liberty is at stake.[10] All attorneys, especially those practicing criminal defense, have a duty to make and preserve a record for appeal. F.R.E. 103. Mr. Goldman's brief statements of grounds for questions and objections could only be considered "argument" under the broadest and most expanded definition of that term. Such a broad interpretation cannot support a conviction for criminal contempt.

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[10] Interestingly, in a case where Judge Wilson was the trial judge, the Ninth Circuit observed that the propriety of threat to hold one in contempt for objecting would be "questionable given the ethical and constitutional obligations under which defense counsel labors." United States v. Moorehead, 57 F.3d 875, 879 n.2 (9th Cir. 1995).

V. Conclusion

For the foregoing reasons, this Court is urged to grant the Petitioner's Writ of Certiorari and review this case.

Respectfully submitted,

/s/_____
DAVID ALLEN
Counsel of Record
CASSANDRA STAMM
Washington Association of
Criminal Defense Lawyers
600 University St.
Suite #3020
Seattle, WA 98101
(206) 447-9681

Of Counsel:
LISA B. KEMLER
National Association of
Criminal Defense Lawyers
108 North Alfred St.
Alexandria, VA 22314
(703) 684-8000

Counsel for Amicus Curiae